Supreme Court, U.S.
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No. 90-1424

In the Supreme Court of the United States

OCTOBER TERM, 1990

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,
PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI
FILED: MARCH 11, 1991
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Docket No. CV 3-86-757

DEFENDERS OF WILDLIFE, ET AL., PLAINTIFF

v.

MANUEL LUJAN, SECRETARY OF THE INTERIOR

RELEVANT DOCKET ENTRIES

Date	NR	Proceedings
		* * * * *
8-27-86	1	COMPLAINT – Summons Issued
		* * * * *
	3	PLTF. NO/MO FOR SUMMARY JUDGMENT, (no date set) W/AFF OF RICHARD DUNCAN and Exhibits (Exhibits Separate)
10-4-86	4	FIRST AMENDED COMPLAINT
10-27-86	5	PLTS NO/MO FOR SUMMARY JUDGMENT, REt. before DDA on 11-21-86 at 9:30am in ST. Paul
10-28-86	6	DEFT'S NO/MO TO DISMISS, Ret. before DDA on 11-21-86 at 9:30am in St. Paul, MN
		* * * * *
11-13-86	9	APPENDIX-VOL I AFF. OF John M. Fitzgerald and Exhibits

Date	NR	Proceedings
	10	APPENDICES – VOLS II-X, Aff. of Joyce M. Kelly W/Exh., Aff. of Elliott McClure w/exh. Aff. of Maxine E. McCloskey w/exh., Aff. of Dr. John W. Grandy w/exh., Aff. of J. Campbell w/exh., Aff. of Amy Skilbred, Aff. of Judy M. Bellairs, Aff. of Brian B. O'Nell, Aff. of Steven C. Schroer
		* * * * *
2-25-87	12	MEMORANDUM AND ORDER (DDA) that deft's motion to dismiss is granted and that pltfs' action is dismissed for lack of standing. cc:attys.
		[Stamped closed]
3-26-87	13	PLAINTIFFS' **NOTICE OF APPEAL** TO THE EIGHTH CIRCUIT COURT OF APPEALS FROM JUDGE ALSOP'S ORDER OF 2-25-87.
		* * * * *
10-31-88	16	CERTIFIED COPY OF THE MANDATE FROM THE 8TH CIR. COURT OF APPEALS (Gibson, Bowman and Wollman-J; Filed 7/08/88) THAT: The order dismissing the complaint is reversed and the case is remanded to the district court for further proceedings consistent with this opinion.
	17	CERTIFIED COPY OF THE JUDGMENT FROM THE 8TH CIR. COURT OF APPEALS THAT: It is ordered

Date	NR	Proceedings
		and adjudged that the judgment of the district court be reversed and the cause remanded to the district court for proceedings consistent with the opinion of the circuit court. MANDATE ISSUED 10/27/88
11-14-88	19	PLTFS NO/MO FOR SUMMARY JUDGMENT, Ret. before DDA on 12-2-88 at 11:00am.
	20	AFFIDAVIT II OF RICHARD DUNCAN AND PLTFS' EXHIBITS NOS. 20-28.
		* * * * *
2-9-88	24	*ANSWER* OF DEFT.
	25	DEFT NO/TAKING DEPOSITION of Steven C. Schroer on 12-14-88 in Mpls, MN.
	26	DEPT NO/TAKING DEPOSITION of Judy M. Bellairs on 12-14-88 in Mpls, MN.
		* * * * *
	29	DEFT NOTICE OF LODGING OF ADMINISTRATIVE RECORD.
12-23-88	30	DEFTS OPPOSITION TO PLTFS' MOTION FOR SUMMARY JUDGMENT.
	31	DEFTS NO/MO AND CROSS MOTION FOR SUMMARY JUDGMENT, Ret. before DDA on 1-13-89 at 10:00am.

Date	NR	Proceedings
12/27/88	32	LETTER from Kolker that Deposition of Amy Skilbred is needed for motion.
	33	DEPOSITION OF AMY KATRIN SKILBRED
12/29/88	34	DEPOSITION OF JOHN M. FITZGERALD
	35	DEPOSITION OF H. ELLIOTT McCLURE
	36	DEPOSITION OF MAXINE E. McCLOSKEY
	37	DEPOSITION of John W. Grandy
	38	DEPOSITION OF J. Campbell Plowden
	39	DEPOSITION OF JUDY M. BELLAIRS
	40	DEPOSITION OF STEVEN C. SCHROER
1-4-89	41	AFFIDAVIT OF MELISSA K. WINN AND PLTFS' EXHIBIT NOS. 29-38.
1-6-89	42	AFFIDAVIT III OF RICHARD A. DUNCAN & ATTACHMENT
1-11-89	43	AFFIDAVIT OF MARY SUE HALFACRE.
	44	AFFIDAVIT OF AMY K. SKILBRED.
1-9-89	45	EXHIBITS TO DEFT. REPLY TO PLTF'S OPPOSITION TO DEFT. CROSS MOTION FOR SUMMARY JUDGMENT.

Date	NR	Proceedings
1-13-89	46	MINUTES (DDA/LL) Cross motions for summary judgment-taken under advisement.
2-15-89	47	ORDER (DDA) that (1) deft's motion for summary judgment is denied; (2) plfts's motion for summary judgment is granted; and (3) the Clerk shall enter judgment as follows: **IT IS ORDERED, ADJUDGED, AND DECREED** That the Secretary of Interior shall: 1. Revoke and rescind so much of 50 C.F.R. Part 402 (1987) as limits the consultation requirement of section 7 of the Endangered Species Act, 16 U.S.C. § 1536, to federal agency action that may affect endangered or threatened species in the United States or on the high seas; 2. Publish, within thirty (30) days of the lifting of any stay of execution of this judgment, proposed regulations clearly recognizing the full mandate of section 7 of the Endangered Species Act, expressly and affirmatively requiring that each federal agency consult with the defendant Secretary with respect to any agency action that may affect any endangered or threatened species, wherever found;

Date	NR	Proceedings
		3. Publish, within sixty (60) days of the lifting of any stay of execution of this judgment, final regulations clearly recognizing the full mandate of section 7 of the Endangered Species Act, expressly and affirmatively requiring that each federal agency consult with the defendant Secretary with respect to any agency action that may affect any endangered or threatened species, wherever found.
		Execution of this judgment shall be stayed for sixty (60) days or during the course of any appeal.
	48	JUDGMENT entered.
3-9-89	49	NOTICE AND MOTION OF PLTFS. FOR ATTORNEYS' FEES, RET. 4-28-89 at 9:30 A.M. before DDA, with aff. of Brian B. O'Neill.
4-11-90	50	DEFT'S **NOTICE OF APPEAL** TO THE EIGHTH CIRCUIT COURT OF APPEALS FROM JUDGE Alsop's order of 2-15-89.

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Docket No. 89-5192MN

DEFENDERS OF WILDLIFE, ET AL., APPELLEES

v.

MANUEL LUJAN, SECRETARY OF THE INTERIOR, APPELLANT

RELEVANT DOCKET ENTRIES

Date	Filing-Proceedings
1989	
04-12	DOCKETED APPEAL
	CERTIFIED COPIES of notice of appeal, order and judgment of 2-15-89, and district court docket entries.
	* * * * *
June 30	*BRIEF OF APPELLANT w/ADDENDUM* 50 pp; w/srv: 6/29/89; 8 copies.
Jul 31	MOTION of appellant to consolidate appeals no. 89-5192 with 89-5386MN. MOTION GRANTED 8/1/89.
Aug 1	DOCKET NOTE: per conversation w/applnt, Brief of aplnt in this case covers 89-5386 as well.
Jul 31	*BRIEF OF APPELLEE* 50 pp; (srv: 7-31-89); 7 copies.

Date	Filing-Proceedings
Aug 3	DOCKET NOTE: Appellant to file suplmntl brief in 89-5386 addressing the attorney fee issue. Brief due by 8/15/89; aplee's response due 8/30/89.
Aug 3	DOCKET NOTE: Received corrected copies of appellee's brief, containing an addendum.
	* * * * *
Aug 15	*REPLY BRIEF OF APPELLANT* 21 pp; w/srv 8/14/89; 7 copies w/89-5386
	* * * * *
1990	
May 17	ARGUED AND SUBMITTED IN ST. PAUL BEFORE JUDGES J. R. GIBSON, BRIGHT AND FAGG. David C. Shilton for appellant. Brian B. O'Neill for appellee. Rebuttal by David C. Shilton. Recorded. w/89-5386
	* * * * *
Aug. 10	OPINION BY JOHN R. GIBSON PUBLISHED (w/89-5386MN)
Aug. 10	JUDGMENT: The judgment of the district court in this cause is affirmed in accordance with the opinion of this court. (w/89-5386 MN)
Aug. 21	BILL OF COSTS INCLUDING ATTORNEYS' FEES (w/attachments) (w/89-5386MN)
Aug. 20	MOTION for extension of time to file petition for rehearing of aplnt GRANTED TO 9/24/90 ON 8/24/90 w/5386

Date	Filing-Proceedings
Aug. 29	MOTION FOR EXTENSION OF TIME to file response to Bill of Cost and Attorneys' Fees GRANTED 8/30/90 to and including Sept. 7, 1990. (from aplnt.) (w/service)
Aug. 30	MOTION FOR STAY OF MANDATE from aplnt. (w/service) (w/5386)
Sept. 10	Response to Motion for Costs and Attorneys' Fees
Sept. 24	ORDER: Issuance of mandate will be stayed until 10-1-90 pending filing of a petition for rehearing or at least 7 days after any petition for rehearing is denied, if filed. UNPUB w/5386
Sept. 24	PETITION FOR REHEARING with suggestions for rehearing en banc from aplnt. (w/ser) (w/89-5386)
Nov. 8	DOCKET NOTE: Response requested from aplee. to aplnt's petition for rehearing. Due 11/19/90 (w/5386MN)
Nov. 19	RESPONSE from aplee to aplnt's petition for rehearing—to Ct.
Dec. 10	ORDER: aplnt's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judges Bowman and Beam would have granted the petition. Petition for rehearing by the panel is also denied.
Dec. 17	MOTION of appellant for stay of mandate. (w/service) (w/5386)

Date	Filing-Proceedings
Dec. 18	SUPPLEMENTAL MOTION FOR COSTS from aplee (including attorneys' fees) (w/5836) (attached affidavit in support)
Dec. 20	RESPONSE from aplnts to aplees' supplemental motion for costs and fees. (w/service)—to Ct.
Dec. 27	MEM. in opp. to mot. to stay mandate from aplee (Def. of Wildlife) (w/ser)—To Ct. (w/5386)
1991	
Jan. 7	ORDER: Motion of the government for stay of issuance of mandate has been considered by the court and is granted. The issuance of the mandate shall be stayed for ninety (90) days from Dec. 10, 1990, and if a petition for writ of certiorari is filed, until the court receives notice that certiorari has been granted or until the court receives the mandate of the Supreme Court. Mandate will issue 7 days after notification that pet. for writ of cert. will not be filed. (w/5386)
Mar. 7	RECEIVED notification from U.S. Sup. Ct. of appl. for extension of time to file pet. for writ of cert. granted to and including April 9, 1991. (w/5386)
Mar. 13	RECEIVED letter stating that the government has filed a petition for writ of certiorari in the Supreme Court on 3/11/91, per counsel.
Mar. 18	NOTICE OF FILING petition for certiorari in the Sup. Ct. of the U.S. as case No. 90-1424 on March 11, 1991. w/5386.

Date	Filing-Proceedings
May 20	ORDER received from the Sup. Ct. of the U.S. which stated that petition for writ of certiorari had been granted in case No. 90-1424 on May 13, 1991. w/5386

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil No. 3-86-757

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, AND THE HUMANE SOCIETY OF THE UNITED STATES, PLAINTIFFS,

VS.

DONALD P. HODEL, AS SECRETARY OF THE INTERIOR, DEFENDANT.

FIRST AMENDED COMPLAINT

Plaintiffs, for their complaint against the defendant, state and allege:

JURISDICTION

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1331(a) as the action arises under the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. § 553 and 5 U.S.C. §§ 701 *et seq.*, as hereafter more fully appears. This court also has jurisdiction pursuant to 28 U.S.C. §§ 1361 and 2201. In addition, the Court has jurisdiction over citizen suits to enforce the Endangered Species Act pursuant to 16 U.S.C. § 1540(g).

PARTIES

2. Plaintiff Defenders of Wildlife is a nonprofit District of Columbia corporation with its principal place of business in Washington, D.C.

3. Friends of Animals and Their Environment is an unincorporated association with its principal place of business in Minneapolis, Minnesota.

4. The Humane Society of the United States is a nonprofit District of Columbia corporation with its principal place of business in Washington, D.C.

5. Plaintiffs, and each of them, are organizations formed for, among other reasons, the preservation of endangered and threatened species of wildlife. Plaintiffs and their members have an interest in the enforcement and administration of the Endangered Species Act, 16 U.S.C. §§ 1531 **et seq**., and observe and enjoy, when possible, endangered and threatened species of wildlife, including those species whose primary ranges are outside the United States. The actions of the defendant harm in fact the plaintiffs by, among other ways, increasing the rate of extinction of endangered and threatened species, species whose presence on earth the plaintiffs observe and enjoy.

6. Defendant Hodel is Secretary of the Department of Interior. He is charged with implementation of the Endangered Species act, 16 U.S.C. §§ 1531 **et seq**.

THE LISTING OF ENDANGERED SPECIES UNDER THE ENDANGERED SPECIES ACT

7. The Endangered Species Act ("the Act"), 16 U.S.C. §§ 1531 **et seq**., was enacted in 1973. All Federal agencies are commanded by the Act to use their authority in furtherance of the purposes of the Act. 16 U.S.C §§ 1531(c) and 1536(a) (1).

8. The Act, in its language and legislative history, contains a commitment by the United States to the international conservation of endangered and threatened species. *E.g.*, 16 U.S.C. § 1531(a) (4).

9. Section 4 of the Act, 16 U.S.C. § 1533, requires the Secretary of the Interior to list species of wildlife or plants endangered or threatened with extinction. The Secretary's regulations with regard to listing, and the lists of species themselves, may be found at 50 C.F.R. Part 17.

10. Under Section 4 and regulations published pursuant thereto, both domestic species and species whose primary range is foreign to the United States are listed if endangered or threatened. As of January 1986, of 883 species listed as endangered or threatened, 493 were species whose primary range lay outside the United States. In addition, there are both endangered and threatened species with ranges that span United States and foreign borders.

11. Neither Section 4 of the Act, nor any other section, contains distinctions between domestic species and foreign threatened or endangered species with respect to the requirements for listing, or the degree of protection to be afforded listed species. The Secretary has listed and continues to list species whose primary range is outside the United States.

SECTION 7 OF THE ACT
AND THE REQUIREMENT OF CONSULTATION

12. Under Section 7(a) of the Act, 16 U.S.C. § 1536(a), Federal agencies have a duty to consult with the Secretary of Interior to insure that agency actions are "not likely to jeopardize the continued existence of *any* endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.* * *." 16 U.S.C §1536(a) (2) (emphasis added).

13. Nothing in the langauge of Section 7, or any other part of the Act, restricts the scope of this consultation duty to Federal agency actions occurring within the United States.

14. After consultation with an affected agency, the Secretary must issue an opinion ("no jeopardy" opinion) detailing the effect of the proposed Federal agency action on endangered or threatened species or on their critical habitat, and proposing acceptable alternative action if the proposed action is found to threaten said species. 16 U.S.C. § 1536(b).

15. All species listed pursuant to Section 4 of the Act are protected under the consultation and no jeopardy opinion provisions of Section 7. This protection applies to threatened or endangered species listed whose primary range falls within the United States and those listed species whose primary range falls within foreign nations.

DEVELOPMENT OF SECTION 7 CONSULTATION REGULATIONS

16. Shortly after passage of the Act in 1973, a series of consultations within the Department of Interior and among Interior and other Federal departments and agencies began. The purpose of these discussions was to outline the requirements Section 7 imposed on Federal agencies and departments.

17. The Fish and Wildlife Service (FWS) was designated the lead agency within the Department of Interior for formulating regulations to implement Section 7; the National Marine Fisheries Service (NMFS) was designated the lead agency within the Department of Commerce to carry out those Section 7 responsibilities vested in

the Department of Commerce. [For purposes of this complaint, the terms "Fish and Wildlife Service" or "FWS" will incorporate joint actions of FWS and NMFS.]

18. On April 22, 1976, "Guidelines to Assist the Federal Agencies in Complying With Section 7 of the Endangered Species Act of 1973" were transmitted to all Federal agencies by the Fish and Wildlife Service. After revision of these Guidelines based on Federal agency comments, the FWS issued a Notice of Proposed Rulemaking on January 26, 1977. 42 Fed. Reg. 4868 (1977).

19. These proposed rules explicitly stated that the consultation provisions of Section 7 applied to actions taken by a Federal agency in a foreign nation. This would protect species listed pursuant to Section 4 whose primary range is in a foreign nation from actions by a United States agency or actions financed with United States money that might jeopardize the existence of said species. Proposed 50 C.F.R. § 17.91, 42 Fed. Reg. at 4871 (1977).

20. The consultation requirement applied to Federal agencies in the United States planning actions having an impact on threatened or endangered species whose primary range was outside the United States.

21. The proposed rules received extensive comment and led to final rulemaking on January 4, 1978. 43 Fed. Reg. 870 (1978) (the 1978 rule).

22. The final rulemaking retained in full the provision of the proposed rule applying Section 7 requirements to Federal agency actions occurring in foreign countries. 50 C.F.R. § 402.02, 43 Fed. Reg. at 874 (1978).

23. Congress in 1978 amended the Act, Nov. 10, 1978, P.L. 95-632, § 3, 92 Stat. 3752. In so doing, Section 7 was lengthened considerably. New Section 7(a) [the current form of the consultation requirement] was enacted with

the intention of restating existing law on Section 7 consultation requirements, including the regulations at 50 C.F.R. Part 402, 43 Fed. Reg. 870 (1978).

DEVELOPMENT OF THE 1986 RULE

24. On June 29, 1983, the Fish and Wildlife Service published a Notice of Proposed Rulemaking to revise 50 C.F.R. Part 402. 48 Fed. Reg. 29990 (1983). The proposed rule cut back the scope of Section 7 consultation requirements to Federal agency actions planned for the United States, its territorial waters, and the outer continental shelf.

25. Similarily, the term "action" contained in Section 7 ["Federal agency action"] was defined by the FWS for the first time in the 1983 proposed rulemaking. The new definition considered only agency actions within the United States, its territorial waters, or the outer continental shelf to be "actions" within the meaning of the consultation requirement of Section 7.

26. The effect of these proposed changes was to deny to species listed by the Fish and Wildlife Service pursuant to Section 4 of the Act whose primary range is outside the United States the protection those species had received both under the 1978 rule and the Act.

27. Several commenters, including Defenders of Wildlife, asserted that the rule should continue to apply to agency actions occurring in foreign countries. In addition, an Interagency Task Force formed pursuant to the International Environment Protection Act of 1983, 22 U.S.C. § 2151q, cited Section 7(a) (2) of the Endangered Species Act in recommending that Federal agencies "should continue to adopt policies withholding support for certain types of projects that degrade or destroy fragile or protected lands" in foreign nations.

28. On June 3, 1986, FWS published a final rule revising the 1978 rule. 50 C.F.R. Part 402, 51 Fed. Reg. 19926 (1986) (the 1986 rule).

29. In response to the comments on the proposed rule, FWS retained that portion of the 1978 rule applying Section 7 to Federal agency actions on the high seas. The 1986 rule rescinded that portion of the 1978 rule which applied the consultation requirements of Section 7 to Federal agency actions in foreign nations. The definition of "action" in the 1986 rule likewise purported to limit the applicability of Section 7's consultation requirement to agency actions occurring in the United States or on the high seas.

30. The Secretary, as a matter of policy, does not require consultation on Federal actions that occur outside the United States even if those actions jeopardize the continued existence of a listed species or adversely affect its critical habitat.

31. Although consultations on Federal agency actions in foreign lands will not be conducted under the 1986 rule, FWS will continue to list species whose primary range is found outside of United States jurisdiction when those species are determined to be endangered or threatened pursuant to Section 4 of the Act.

32. FWS provided no reasoned analysis in its announcement of the final rule as to why its position of ten years was unworkable as applied to Federal agency actions planned for foreign nations, nor a reasoned analysis of the superiority or necessity of the 1986 rule with its limitations on the application of the plain language of Section 7 of the Act.

VIOLATIONS OF LAW ALLEGED

COUNT I

(Violation of the Endangered Species Act)

33. Any and all of defendant's actions in promulgating rules, or in adopting a policy, not providing endangered or threatened species listed pursuant to Section 4 of the Act whose primary range is outside the United States the full protection guaranteed them under Section 7 of the Act violate Section 7(a) of the Act, 16 U.S.C. § 1536(a).

34. Implementation of defendant's regulations, 50 C.F.R. Part 402, 51 Fed. Reg. 19926 (1986), or his policy, threatens imminently and irreparably the interests of plaintiffs and the public. Their interest in the continued application of Section 7 of the Act to agency actions abroad can only be protected if defendant's 1986 rule is declared illegal and its implementation is enjoined by this Court. Plaintiffs have no adequate remedy at law.

COUNT II

(Violation of the Administrative Procedure Act)

35. Any and all of defendant's actions in authorizing a rescission of the 1978 rule and its replacement with current 50 C.F.R. Part 402, 51 Fed. Reg. 19926 (1986), and in adopting his non-consultation policy, are arbitrary, capricious, an abuse of discretion, and contrary to law, in violation of the Administrative Procedure Act, 5 U.S.C. § 553, and 5 U.S.C. §§ 701 *et seq*.

36. Issuance of the aforesaid 1986 rule, 50 C.F.R. Part 402, 51 Fed. Reg. 19926 (1986), constitutes a final agency action and threatens imminently and irreparably the interests of plaintiffs and the public and should be declared illegal. Plaintiffs have no adequate remedy at law.

COUNT III
(Violation of Secretary's Statutory Duty to Conserve Endangered or Threatened Species)

37. Any and all of defendant's actions in promulgating 50 C.F.R. Part 402, 51 Fed. Reg. 19926 (1986), and in adopting his non-consultation policy, violate the declared policy of the Act to "conserve endangered and threatened species," 16 U.S.C. § 1531(c) and § 1536(a) (1), when these species primary ranges are found in foreign lands and may be affected by Federal agency action.

38. The aforesaid failure constitutes an imminent and irreparable threat to plaintiffs' interests and should be declared illegal. Plaintiffs have no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for the following relief:

A. That the Court adjudge and decree defendant's aforesaid acts in promulgating the 1986 rule eliminating application of Section 7 of the Act to Federal agency actions planned for foreign nations illegal as alleged herein.

B. That the Court provide supplemental relief by preliminarily and permanently enjoining defendant and his agents or employees from implementing the newly promulgated regulations.

C. That the Court direct defendant to perform the duties owed plaintiffs, specifically to publish forthwith regulations requiring federal agencies to consult on agency actions abroad that may affect endangered or threatened species.

D. That plaintiffs herein recover from defendant the costs of this citizen suit, including reasonable attorney's fees, as provided for under the Endangered Species Act, 16 U.S.C. § 1540(g) (4) and the Equal Access to Justice Act, 28 U.S.C. § 2412(d).

E. That plaintiffs have such other, further, and different relief as the nature of this case may require or the Court may deem just and appropriate.

Dated: October 7, 1986

/s/ Brian B. O'Neill
BRIAN B. O'NEILL
STEVEN C. SCHROER
ALAN M. ANDERSON
2300 Multifoods Tower
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Attorneys for Plaintiffs

OF COUNSEL:
FAEGRE & BENSON
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33 South Sixth Street
Minneapolis, Minnesota 55402

UNITED STATES DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington, D.C. 20240

Dec. 3, 1974

In Reply Refer To:
FWS/SE

Dear

On December 28, the President signed the Endangered Species Act of 1973. This Act is looked upon as one of the strongest pieces of conservation legislation yet enacted. It implements several international agreements, establishes a strong Federal program, mandates close cooperation among Federal agencies and encourages the initiation or expansion of complementary programs at the State level. The Act designates the Departments of Interior and Commerce as the lead agencies for its implementation. Copies of both the Act and the current list of endangered species are enclosed.

This new Act provides much broader coverage than the Act it repealed—The Endangered Species Conservation Act of 1969. Among other things it:

—gives consideration to *all* animal life. The earlier statute considered only vertebrates, molluscs, and crustaceans; thus, omitting from consideration the vast majority of the species with whom we share this planet and who play major roles in the earth's ecosystems;

—recognizes two degrees of threat. The earlier statute addressed only species that were "Endangered"—i.e., "threatened with extinction." The new law retains that

classification but adds another category of "Threatened species" – i.e., "a species which is threatened with *becoming* Endangered." This new authority enables recognition of species that are heading toward serious trouble and enables implementation of preventative action *before* that critical stage is reached. Such action not only enhances the likelihood of the successful recovery of that species but enables the use of less drastic – and usually more economical – techniques to bring about such recoveries;

– recognizes the need to consider "populations" as well as species or subspecies. The earlier statute recognized only described species or subspecies rather than the more ecologically valid concept of population conservation embodied in the new Act. This authority, when coupled with the ability to determine "Threatened" as well as "Endangered" species, enables the application of protective regulations where and to the degree needed;

– recognizes the importance of the continued existence of all wild plants as well as wild animals. The Act provides authority to develop lists of Endangered and Threatened plants and for the Secretary of the Smithsonian Institution to coordinate, within one year, a review of Threatened or Endangered plants and to recommend methods for conserving them – including recommendations for legislative action if such is necessary;

– implements the Convention on International Trade in Endangered Species of Wild Fauna and Flora. Enactment of this law enabled the United States to become the first nation to ratify that treaty and to begin setting up mechanisms for cooperation with other Nations as they complete their ratification procedures;

- makes Federal employees subject to prosecution for violating, or causing a violation, of section 9 of the Act, and gives any citizen standing to enjoin such actions;

- authorizes Federal agency heads to cancel licenses, contracts, or other agreements authorizing the use of Federal lands by persons convicted of criminal violations of the Act;

- requires a high degree of concern on the part of Federal agencies in insuring that their activities do not amplify the threat faced by *any* Threatened or Endangered Species. Section 7 of the Act states:

> "...The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical."

Authority for coordinating the Department of the Interior's responsibilities has been delegated through the Assistant Secretary for Fish and Wildlife and Parks to the Fish and Wildlife Service. Similar authority for the Department of Commerce has been delegated to the National Marine Fisheries Service.

In order to bring about the "consultation and assistance" between our agencies required by the Act, we would appreciate your designation of a liaison officer with whom our personnel can communicate. That individual should be authorized to represent your position on matters pertaining to the implementation of the Act. Please advise both (1) the Director, Fish and Wildlife Service, United States Department of the Interior, Washington, D.C. 20240 and (2) the Director, National Marine Fisheries Service, United States Department of Commerce, Washington, D.C. 20231 of the name, title, address, and telephone number of your designee.

We plan to host a day-long conference in Washington early in 1975 to which these designees will be invited and at which questions can be resolved and working procedures can be established.

We are looking forward to working with your personnel in implementing the Endangered Species Act of 1973.

Sincerely yours,

/s/ Rogers CB Morton
Secretary of the Interior

/s/ Frederick B. Gelt
Secretary of Commerce

Enclosure

IDENTICAL LETTERS FORWARDED TO THE ATTACHED LIST OF PEOPLE

UNITED STATES DEPARTMENT OF THE INTERIOR
Fish and Wildlife Service
Washington, D.C. 20240

In Reply Refer To:
FWS/AFA

Memorandum April 22, 1976

To: All Federal and State agencies concerned with Section 7 of the Endangered Species Act of 1973

Dear Cooperator:

Enclosed are "Guidelines to Assist Federal Agencies in Complying with Section 7 of the Endangered Species Act of 1973." The guidelines were developed by the U.S. Fish and Wildlife Service, U.S. Department of the Interior, and the National Marine Fisheries Service, U.S. Department of Commerce, with the assistance of an Interagency Ad Hoc Committee composed of representatives from 11 Federal agencies and departments.

The guidelines are intended to be broad and flexible so that they may be used by the various Federal agencies and departments to prepare internal guidelines and procedures they feel necessary to fulfill the requirements of section 7 of the Endangered Species Act of 1973. They are not intended to preempt or hinder actions or other statutory obligations of your agency or department, but rather to assist you in meeting the requirements of the Act. Further, you may use these guidelines, in whole or in part, at your discretion subject to the requirements of section 7.

These guidelines are currently receiving a "Quality of Life Review" by the Office of Management and Budget. If you have comments that you would like considered in this Review, please forward them to the Director, U.S. Fish and Wildlife Service or National Marine Fisheries Service, and they will be forwarded to OMB.

In addition, the guidelines will provide a starting point from which regulations will be developed. Standard rulemaking procedures will be used for the regulations which will provide for comments by your agency or department before final regulations are published in the *Federal Register*. Should you have questions or comments, please contact us, and we will be glad to provide appropriate assistance.

The U.S. Fish and Wildlife Service and the National Marine Fisheries Service, to the extent we are able, stand ready to assist your agency or department in meeting the requirements of the Act. It is our sincere belief that only through an atmosphere of close coordination and cooperation between the Federal agencies and departments can the intent of the Endangered Species Act of 1973 be met – to provide programs of conservation and protection for Endangered species and Threatened species and the ecosystems upon which they depend so that these species can be restored as viable components of the environment.

/s/ Lynn A. Greenworth
Director, U.S. Fish and
Wildlife Service

/s/ Robert H. Shenning
Director, National
Marine Fisheries
Service

Enclosure

GUIDELINES TO ASSIST FEDERAL AGENCIES IN COMPLYING WITH SECTION 7 OF THE ENDANGERED SPECIES ACT OF 1973

The following guidelines were prepared by the United States Fish and Wildlife Service (FWS), U.S. Department of the Interior, and the National Marine Fisheries Service (NMFS), U.S. Department of Commerce to assist the Federal Departments and agencies (hereinafter referred to as Federal agency or agencies) in meeting their responsibilities under section 7, 16 U.S.C. §§ 1537, of the Endangered Species Act of 1973 (hereinafter referred to as the Act), 16 U.S.C. §§ 1531-1543 (Supp. III, 1973).

The guidelines were developed at the request of Federal agencies at a May 29, 1975, conference on the Act and its implication on Federal activities programs. In response to the request, an Ad Hoc Interagency Committee was convened by the Directors, FWS and NMFS, to advise the two Services in developing the necessary guidance. The Committee was composed of representatives from 11 Federal agencies who were instrumental in providing advice necessary to reflect the guidance needs for a wide range of Federal activities and programs.

The guidelines are intended to furnish a broad framework within which Federal agencies may prepare internal procedures to guide their activities or programs in fulfilling the requirements of section 7 of the Act. The guidelines also are intended to be sufficiently flexible so that they can be applied to the diverse activities and programs undertaken by Federal agencies which may have an effect upon Endangered or Threatened species (hereinafter referred to as listed species) or their habitats. Activities and programs as used herein apply to all actions authorized, funded, or carried out by Federal agencies, examples of which include but are not limited to, (1) programs or ac-

tivities intended to conserve listed species or their habitats, (2) promulgation of regulations which would beneficially or detrimentally affect listed species or their habitats, (3) granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid, which might affect listed species or their habitats, or (4) activities or programs directly or indirectly, causing physical modifications to the land, water, or air within the range or habitat area of listed species.

The respective jurisdictions of the Secretaries of Interior and Commerce for listed species of fauna were established by Reorganization Plan Number 4 of 1970, 5 U.S.C. App. (1970). A Memorandum of Understanding, dated August 28, 1974 (copy attached), further defines the jurisdictional responsibilities of the two Services. The FWS and the NMFS have been delegated the responsibilities of the Departments of Interior and Commerce for implementing the Act and their responsibilities were identified in the December 3, 1974 letter to the various Federal agencies from the Secretaries of Interior and Commerce. (Copy attached) The lists of Endangered and Threatened native and foreign fauna under the jurisdiction of the FWS and the NMFS are found in 50 C.F.R. 17.11. The NMFS regulations specify those species of fauna under its jurisdiction and are contained in 50 C.F.R. 22.33, 39 Fed. Reg., 41367-41377, November 27, 1974. Jurisdiction over Endangered and Threatened flora is divided among the Secretaries of Agriculture, Commerce, and Interior, as defined by the Act. The Secretary of Agriculture's responsibility is limited to importation and exportation of terrestrial plants. Other functions under the Act relating to terrestrial plants such as listing and section 7 consultation and assistance, and all functions relating to marine plants are the responsibilities of the Secretaries of the Interior and Commerce. No agreement is presently in effect as to

the division of these responsibilities for plants between the Secretaries of Commerce and Interior but one is expected prior to the listing of flora species.

It is not the intent or purpose of the FWS or the NMFS through the issuance of these guidelines to hinder, halt, or preempt actions or statutory requirements of other Federal agencies. Rather, the guidelines are provided only to assist the Federal agencies in meeting their responsibilities under section 7 of the Act. Furthermore, the Federal agencies are not obligated to adopt in whole or in part the guidelines presented here. They may be used by the Federal agencies at their discretion.

The consultation and assistance process proposed here is viewed as a means of providing responsible Federal agencies with the benefit of information, biological opinions, and expertise available in the FWS and the NMFS on the effects of actions upon listed species and their habitats. Such information and expertise might otherwise not come to the attention of the Federal agencies during the planning and implementation of their actions. This process is also viewed as essential for coordinating all research, investigations, studies for management or conservation programs pertaining to listed species and their habitats as well as disseminating such information throughout the government.

These guidelines are distributed to the Federal agencies for their internal guidance and will not be published in the *Federal Register*. The Federal agencies should be aware, however, that these guidelines will be used as a starting point for the development and promulgation of regulations. Rulemaking procedures will be followed which will afford all interested Federal agencies, as well as members of the public, an opportunity to comment on proposed regulations before they become final. In addition, the

guidelines do not offer guidance in respect to complying with State laws or regulations concerning listed species or species considered threatened with extinction within the States.

I. Section 7—General Parameters
   A. Scope of Section 7
      1. Section 7 applies to listed species of fauna and flora (although no flora species are presently listed, listings are anticipated by early 1976).
      2. Section 7 applies to activities and programs by Federal agencies affecting listed species in foreign countries and on the high seas, as well as in the United States. (The concept of jeopardy applies to all listed species, native and foreign. Whether the critical habitat concept applies in foreign countries or not is an unresolved question at this time).
   B. Requirements of section 7
      1. All Federal agencies, including Services, Bureaus and Offices within the Departments of the Interior and Commerce, in consultation with the FWS or NMFS and with their assistance, shall utilize their authorities in furthering the purpose of the Act.
         a. The FWS has been delegated the Secretary of Interior's primary responsibility for implementing the Act by 242 DM 1 and 632 DM 1.4. The October 16, 1974, memorandum from the Secretary of Interior to Assistant Secretaries and Heads of Bureaus and Offices further defines the responsibilities of the FWS.

b. The NMFS has been delegated the Secretary of Commerce's responsibility for implementing the Act by memoranda dated February 4, 1974, in which the Secretary delegated his authority to the Administrator of the National Oceanic and Atmospheric Administration and such authority was then delegated to NMFS by Memorandum, dated March 11, 1974.

c. The December 3, 1974, letter from the Secretaries of Interior and Commerce provided additional definition of the responsibilities of the FWS and the NMFS in coordinating and implementing the Act for the respective Departments.

2. Within the limits or opportunities of their authorities, Federal agencies shall carry out programs for the conservation of listed species.

3. Federal agencies shall not authorize, fund, or carry out actions that will result in jeopardizing the continued existence of listed species.

4. Federal agencies shall not authorize, fund or carry out actions that will result in the destruction or adverse modification of the habitats of listed species that have been determined critical by the Secretary, through the Director, FWS or NMFS, after consultation as appropriate, with the affected States.

It is recognized that modification of critical habitat can have beneficial or detri-

mental effects on listed species. It was clearly the intent of Congress that "modification" as used in section 7 applies to *adverse* modification. On the other hand, carrying out programs for the conservation of listed species, as required in section 7, could include beneficial habitat modifications. In either case, consultation should be undertaken to insure that available information and expertise can be provided. After consultation, if an activity or program is determined to be beneficial for the habitat of a listed species, but its implementation could consitute a violation of section 9 of the Act, a permit should be requested pursuant to section 10(a) of the Act and applicable FWS or NMFS regulations.

C. Working Concepts

The following are considered to be "working" concepts that can be used to clarify key terms in section 7. It must be emphasized that these are not definitions but are concepts to assist the Federal agencies in clarification of the terms.

1. "Critical Habitat" – means any air, land, or water area including any elements thereof which the Secretary, through the Director, FWS or NMFS, has determined is essential to the survival of wild populations of a listed species or to its recovery to a point at which the measures provided pursuant to the Act are no longer necessary (hereinafter referred to as recovery). Determinations will be published in the *Federal Register*.

2. "Jeopardize the Continued Existence of" – means any action which reasonably would be expected to result in the reduction of the reproductive ability, numbers, or distribution of a listed species to such an extent that the loss would pose a threat to the continued survival or recovery of these species in the wild. This reduction in reproductive ability, numbers, or distribution of listed species would be expected to vary from species to species. In some cases, such as the Whooping crane or Hawaiian crow, it could be a single individual, in other cases, such as an endangered invertebrate, it could be as high as scores, hundreds, or more.
3. "Destructon or (Adverse) Modification" – means any act which would have a deleterious effect upon any of the constituent elements of critical habitat which are necessary to the survival or recovery of such species, and such effect is likely to result in a decline in the numbers of the species.
   a. Constituent elements of critical habitat include, but are not limited to land, air, and water area, physical structure and topography, flora, fauna, climate, human activity, and the quality and chemical content of soil, water, and air.
   b. The requirements for survival or recovery of listed species include space for normal growth, movement or territorial behavior; nutritional requirements such as food, water, minerals;

sites for breeding, reproduction, or rearing of offspring; cover shelter; or other biological, physical, or behaviorial requirements.

D. Application of section 7 to Existing Activities and Programs

1. In considering whether section 7 applies to actions in the planning, review, or implementation stage but not completed prior to December 28, 1973, Federal agencies should determine if the action is (1) one undertaken by a non-Federal entity but one in which the Federal presence and control may still be felt or a Federal decision remains to be made which would permit or prohibit a non-Federal entity to proceed with a project, or (2) one being undertaken by or on behalf of a Federal entity and substantial work remains to be done which would, independent of the effect of earlier work performed, in and of itself jeopardize the continued existence of a listed species or modify or destroy critical habitat of a listed species. If the Federal presence and control remains to be felt, the Federal decision remains to be made, or such work on a Federal project remains to be performed, then the requirements of section 7 should be satisfied.

2. The requirements of section 7 shall be applied to activities and programs of Federal agencies presently in progress and initiated on or after December 28, 1973, that could affect listed species or their habitats. The

concerned Federal agency should request assistance and consultation on activities on programs begun after December 28, 1973 as contained in these guidelines.

II. Determination of Critical Habitat

A. General Requirements

1. It is the responsibility of the Secretary through the Director, FWS or NMFS, to make the final determination of critical habitat for the listed species or for amending or terminating such determinations. All determinations will be made using rulemaking procedures which include notifying the Governors of the affected States and publishing in the *Federal Register* all proposed and final determinations of critical habitat.
2. Upon finding that an emergency exists (e.g., an action is about to take place that will pose a significant risk to the well-being of a listed species by the destruction or adverse modification of its habitat), the FWS or the NMFS may make an Emergency Determation of Critical Habitat. The Emergency Determination will be published in the *Federal Register* and will remain in effect for a maximum of 120 days. A determination of critical habitat using the rulemaking procedures stated in section II.A.1 will be initiated during the 120-day period.

B. Procedures for Determining Critical Habitat

1. The FWS or the NMFS will seek consultation, as appropriate, with the affected

States in which the listed species' habitat occurs.

2. Prior to publishing a proposed rulemaking determining critical habitat for a listed species in the *Federal Register,* the FWS or NMFS will request information, assistance, and recommendations from Federal agencies with jurisdiction over lands, under consideration for such determination. The request will be in writing to such Federal agencies asking that they provide the FWS or NMFS with substantive comments and recommendations, based upon their biological expertise, on the habitat under consideration and how that habitat satisfies and fulfills the constituent elements of critical habitat enumerated in section I.C.3.a. of these guidelines.
3. After reviewing and incorporating, to the extent possible, the comments and recommendations of such agencies, and prior to publishing a proposed rulemaking in the *Federal Register* the FWS or NMFS will write the Federal agencies contacted under II.B.2 and notify them of the proposed critical habitat determination and the reasons for it. Following such notification, the FWS or NMFS will publish the proposed determination in the *Federal Register.*

III. Consultation and Assistance

A. Criteria for Determining the Need for Consultation and Assistance

1. It is the obligation and responsibility of Federal agencies using in-house expertise

or other suitable sources to analyze and review (screen) their activities and programs in light of the "working" concepts discussed in I.C., to ascertain if listed species or their habitats will be affected beneficially or detrimentally. If a Federal agency judges that listed species or their habitats will not be affected by agency actions, the requirements of section 7 will not apply. If it is considered likely that listed species or their habitats could be affected, or if the Federal agencies or their authorized representatives desire the assistance of the FWS or the NMFS in determining the effects of their actions, then the consultation process shall be carried out as contained in these guidelines.

2. Informal consultation can and should be initiated at the field level between the FWS, or the NMFS and the Federal agencies or their authorized representatives (e.g., contractors, researchers, etc). In most cases, this will be a continuation of field coordination and cooperation that has been established in the past. This level of communication will be particularly useful for obtaining information on listed species or their habitats or clarifying the consultation process. It may also assist the Federal agencies in confirming their analysis or judgment of beneficial or detrimental effects that could result from their planned action on listed species or their habitat. Such consultation is supplemental to and not a sub-

stitute for, the formal consultation process described in these guidelines.

B. Initiation of the Consultation and Assistance Process

1. Consultation should be requested by Federal agencies as early as possible during activity or program planning and evaluation of alternatives. Such consultation may disclose conflicts between the activity or program, or proposed alternatives, and listed species considerations. Such disclosure could prompt an early modification of the activity or program or dismissal of alternatives by the Federal agency resulting in a saving of time, manpower, and money which would otherwise be expended by further evaluation.

2. When a Federal agency, using the criteria presented in part III. A. of these guidelines, determines that consultation with the FWS or NMFS should be undertaken, it should forward its written request for consultation to the FWS or the NMFS Regional Director for the Region or high seas in which the activity or program will occur. For activities or programs involving foreign countries, consultation should be requested from the Director, FWS or NMFS. Where Federal funds are used in an activity or program but the action will be carried out by a non-Federal entity, the funding agency should initiate the consultation process.

3. The FWS or the NMFS may from time to time, become aware of a Federal agency

planning or conducting an activity or program that could affect listed species or their habitats that has not received the benefit of the consultation process. When this situation exists, the Regional Director or Director, FWS or NMFS, will promptly notify the Federal agency stating the nature of the action, and requesting that the consultation process be initiated.

C. Consultation and Assistance Process

1. While the burden is on the Federal agencies to collect information and conduct studies, take required actions to insure that their activities or programs will not jeopardize the continued existence of listed species or destroy or adversely modify their critical habitats, the FWS or the NMFS will, to the extent they are able, assist Federal agencies upon request by providing (1) such data and reports as they possess, (2) manpower and resources for the collection of necessary biological data and the conduct of required studies and (3) recommendations for necessary additional data, studies or surveys, suitable alternatives or methods for modification of the proposed action to insure compliance with section 7.

2. Consultation under the Act may be consolidated with other required consultation procedures such as the Fish and Wildlife Coordination Act, National Environmental Policy Act, or other agreed upon procedures. Satisfying the requirements of NEPA, the Fish and Wildlife Coordination Act, or other procedures or laws, may substantially satisfy the consultation process if satisfying such other laws includes

the consultation procedures set forth in these guidelines. Federal agencies should keep in mind, however, that satisfying the requirement of such other laws will not relieve them of the obligation to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of a listed species or modify or destroy critical habitat of a listed species.

3. Following the request for consultation from the Federal agency the Regional Director or Director of FWS or NMFS may arrange for a "threshhold examination" of the area in which the activity or program is proposed to be carried out. A threshhold examination may consist of an on-site inspection of the area and/or a review of available information to make a preliminary assessment as to whether listed species or their habitats will be impacted.
4. The FWS or the NMFS may seek, as appropriate, the assistance of the affected State or foreign country, the Federal agency, Universities, recovery teams, private conservation groups, et al., in conducting the threshhold examination.
5. If the Regional Director or Director is of the opinion, as a result of the threshhold examination of the activity or program, that in no likelihood, will (1) the continued existence of a listed species be jeopardized, (2) the area to be impacted by the activity or program be determined by further examination to be critical habitat, or (3) the activity or program results in the destruction or modification of habitat, previously

determined to be critical by the Secretary, through the Director, the Federal agency will be so notified in writing and further consultation will be unnecessary.

6. If the Regional Director or Director as a result of the threshhold examination is of the opinion that the activity or program may result in jeopardizing the continued existence of listed species or the destruction or adverse modification of previously determined critical habitat, he will so notify the Federal agency, in writing and a time frame in which the consultation process should be completed will be established in agreement with the Federal agency. The Federal agency with the assistance of the FWS or the NMFS, state, private, or other sources of expertise, as appropriate, shall then initiate appropriate surveys, studies, research and other means to obtain data and information relative to the impacts of the activity or program on listed species or their habitats. The data and information will be used by the Regional Director or Director in rendering his final biological opinions and, if requested, recommendations necessary to assist the Federal agency in meeting its obligation to insure that actions authorized, funded, or carried out by it do not jeopardize the continued existence of a listed species or modify or destroy critical habitat of a listed species.
7. If the Regional Director or Director as a result of the threshhold examination is of the opinion that the activity or program

will destroy or modify habitat that may be essential to the survival or recovery of listed species but which has not previously been determined to be critical, he shall so notify the Federal agency, in writing, and promptly initiate procedures described in II.A. and II.B. of the guidelines to determine if the area is critical habitat.

8. Cases may arise in the consultation and assistance process with the Regional Director that, in the opinion of the Regional Director, require the final biological opinion of the Director, FWS or NMFS. Should this become necessary, he will notify the Federal agency and forward all relevant correspondence and background material to the Director. The Director, after appropriate review and consultation with the Federal agency and other appropriate sources, will notify the agency of the final biological opinions and recommendations of the FWS or the NMFS.

D. Completion of the Consultation and Assistance Process

1. The consultation and assistance process clearly should be reflected in a written record from its inception to completion. Where the consultation requirements or procedures related to other laws or procedures, such as NEPA and the Fish and Wildlife Coordination Act, have been used to facilitate the consultation and assistance process described in these guidelines, information relating to affected listed species

and their habitats and the consultation process under these guidelines should be reflected clearly in the final documents required by these other laws (e.g., Environmental Impact Statement, environmental analyses, or assessments, Fish and Wildlife Report, etc.)

2. Consultation and assistance referred to in section 7 will have been completed when the Regional Director or Director, FWS or NMFS, has notified, in writing, the Federal agency, whose activity or program could impact listed species and/or its habitat, of the final biological opinions and, if requested by the Federal agency, recommendations of the FWS or NMFS. Such biological opinions and recommendations shall be accompanied by a statement of the reasons and biological evidence, including appropriate documentation, contributing, to his opinions and recommendations. Upon receipt of the biological opinions and recommendations of the FWS or the NMFS, it will be the prerogative and responsibility of the Federal agency to determine the final course of action that it will follow in light of its statutory requirements.
3. If, after completion of the consultation process, the initiating Federal agency (1) acquires new data revealing impacts to listed species or their habitats not previously considered, (2) substantially modifies its initial activity or program which could affect listed species or their habitats in a

manner not previously considered by that agency in the consultation process, or (3) a new species is listed that would be affected by the activity or program, the agency should redetermine the need for consultation with the FWS or NMFS.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

Office of the Administrator

Nov. 21, 1983

Ms. Nancy Sweeney
U.S. Fish and Wildlife Service
Office of Endangered Species
Suite 500
1000 N. Glebe Road
Arlington, Virginia 22205

Dear Ms. Sweeney:

In accordance with EPA's responsibilities under Section 309 of the Clean Air Act, we have reviewed the U.S. Fish and Wildlife and National Marine Fisheries Service proposed rule to implement Section 7 (Interagency Cooperation) of the Endangered Species Act of 1973, as amended. Our major concerns and recommendations are identified below. A section-by-section discussion of these concerns and recommendations are presented in the enclosed detailed analysis.

Our concerns with the proposed regulation focus on the scope, definition of terms, and threshhold of effects for determination of whether or not a formal agency consultation process must take place as the result of a prospective Federal action, or the prospective issuance of a permit or license by a Federal agency to a private permit or license applicant.

Specifically, the concerns identified in these areas include:

(1) the narrowing of the scope of applicability of Section 7 consultation to exclude Federal actions which occur outside the territorial jurisdiction of the United States; and all actions except those for which a Federal agency has made the determination to prepare an Environmental Impact Statement;

(2) the redefinition and hence reinterpretation, or newly proposed definitions, for the terms "action"; "biological assessment"; cumulative effects "destruction or adverse modification"; and "jeopardize the continued existence of..."

(3) the need to incorporate in the body of the regulation, the specific substantive and procedural criteria and requirements for preparation of a biological assessment;

(4) the apparent reduction as to restrictions on the irreversible or irretrievable commitment of resources for a proposed action prior to completion of a biological assessment; and

(5) the narrowing of the standard for interagency consultation to require adverse, or detrimental effect to be shown as a threshhold test for initiation of formal interagency consultation procedures.

Our concerns and specific recommendations for language revisions are discussed in the enclosed *Detailed Comments*. We offer our staff resources within EPA's Office of Federal Activities to contribute, to the maximum extent feasible, to the development of the final regulation. If you have any questions please contact me or Susan Sarason of our Office of Federal Activities staff at 382-5049.

Sincerely yours,

/s/ Josephine S. Cooper

JOSEPHINE S. COOPER
Assistant Administrator
for External Affairs

Enclosure

DETAILED COMMENTS
PART 402 – INTERAGENCY COOPERATION ENDANGERED SPECIES ACT OF 1973, AS AMENDED PROPOSED RULE

SUBPART A – GENERAL

Section 402.1 – Scope

This Section interprets and implements Section 7(a) through (d) of the Act, Interagency Cooperation. The current regulation includes, within the scope of activities or programs subject to interagency consultation, those federal activities and programs which would occur upon the high seas or in foreign countries. Such extraterritorial application of Section 7 is deleted from the proposed regulation which appears to apply only to actions which would occur within the territorial jurisdiction of the United States. We recommend that the language of the 1978 regulation be retained. Support for this recommendation is found in the language of the statute under the following sections: Section 7(a)(1) which directs that all federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of listed species and critical habitat. The listing of such species and habitat includes those found on the high seas or in foreign countries.

- Section 7(a)(2) which requires federal agencies to insure that *any* action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any listed species or critical habitat. Sections 7(a)(1) and (2) require protection and conservation of listed species and habitat that are found within the territorial limits of the United States, on the high seas or in foreign nations;

- Section 7(i) which prohibits the Endangered Species Committee from considering for exemption any application made to it if the Secretary of State, after a review of the proposed agency action and its potential implications, certifies that the granting of such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States;
- Section 7(n) which provides for judicial review of any decision of the Endangered Species Committee in the U.S. Court of Appeals for any Committee decision which is being, or will be, carried out outside the jurisdiction of U.S. circuit courts. The provision of judicial review over activities beyond the territorial jurisdiction of U.S. courts for decisions of the Endangered Species Committee anticipates that federal agency actions, subject to Section 7 consultation and exemption procedures will occur outside the territorial boundaries of the United States;
- Section 4 which requires the Secretary in making determinations as to whether any species is an endangered or a threatened species, to conduct a review of the status of the species after taking into account those efforts of a State or foreign nation to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas, in making these determinations, the Secretary must consider species which have been designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or foreign nation that is responsible for the conservation of fish or wildlife or plants;

- Section 2 which states that "...the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction...;" and that
  - "Encouraging the states and other interested parties, through federal financial assistance and a system of incentives, to develop and maintain conservation programs, which meet national and international standards is a key to meeting the nation's international commitments and to better safe-guarding, for the benefit of all citizens, the nation's heritage in fish, wildlife and plants."
  - "The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section;"
  - It is further declared to be the policy of Congress that all federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purpose of this Act.

Section 402.2 – Definitions

Our recommended revisions to the definition of terms as proposed in the 1983 regulation are indicated below by the bracekting of language to be deleted and the underlining of new recommended language.

- The language change we are proposing for this definition reflects our concerns regarding the application of Section 7 to extraterritorial activities. This recommended language also conforms more closely to the definition of "activities or program" in the currently operable 1978 regulation.

  "Action – means all [actions] *activities or programs* of any kind authorized, funded, or carried out, in whole or in part, by federal agencies *in the United States, upon the high seas, and in foreign countries*. Examples include, but are not limited to: (a) the promulgation of regulations; (b) the granting of licenses, contracts, leases, easements, right-of-way, permits, or grants-in-aid; or (c) actions directly or indirectly causing modifications to the land, water, or air."

- "Biological assessment" – The proposed definition would not require "each federal agency...with respect to *any agency action of such agency*"...to request of the Secretary the information prescribed in the 1982 amendments, nor prepare biological assessments with such information unless the action proposed is a major construction activity which is a major Federal action significantly affecting the quality of the human environment, for which the action agency has made the determination that an Environmental Impact Statement must be prepared. Consequently, the proposed regulation redefines the congressionally mandated definition of "biological assessment" and narrows its scope of applicability. It is our experience that the majority of federal construction activities and those permitted by federal agencies are not sub-

ject to the level of detail and documentation and analysis of the Environmental Impact Statement (EIS) process. For example, .5% of all Section 404 permits (Dredge and Fill permits issued under Section 404 of the Clean Water Act) are addressed in an EIS. The Department's proposed definition would exempt 99.5% of all Section 404 permits from interagency consultation and compliance with Section 7(a)(2) of the Endangered Species Act. Consequently, we recommend that the language of the regulation adopt, verbatim the definition of biological assessment defined under Section 7(c) of the Endangered Species Act.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-757

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, AND THE HUMANE SOCIETY OF THE UNITED STATES, PLAINTIFFS

vs.

DONALD P. HODEL, AS SECRETARY OF THE INTERIOR, DEFENDANT

AFFIDAVIT OF JOHN M. FITZGERALD

District of Columbia) ss.

John Fitzgerald, being duly sworn, states:

1. I am a member of Defenders of Wildlife.

2. I am on Defenders staff and have been for over two years as Washington Representative for Endangered Wildlife Programs. As such, I work to ensure the strength of the Endangered Species Act and its implementation.

3. I am an attorney and a member in good standing of the District of Columbia Bar.

4. I have a personal and professional interest in the conservation and recovery of endangered and threatened species, proposed and candidate species, and other species likely to become endangered.

5. I have enjoyed and observed, in zoos and on film, endangered and threatened wildlife, including Asian elephants, leopards, and others that will be harmed by U.S. agency actions described herein and in other materials submitted by plaintiffs.

6. I will be harmed, in fact, by the harm to listed wildlife – by the reduction of their availability for viewing in zoos and films, by the elimination of the subjects of my professional work, by the irrevocable and irreparable harm to the web of life that sustains me in my profession and in life.

7. For example, endangered arctic and ˜american peregrine falcons and other endangered species and, in turn, Defenders members who enjoy them, are also harmed by the destruction of their wintering and migration stopover areas that results from projects such as the Polonoroeste Project. This includes construction of highway BR-364 and settlement and planned deforestation of the amazon rain forest funded by World and Inter-American Bank loans to Brazil. The World Bank has committed over $500 million dollars alone to this project. (Aufderheide and Rich, "Debacle in the Amazon", *Defenders*, March/April, 1985, 20-32.)

8. Endangered Species in the Amazon forest that are being harmed by these deforestation projects also include the jaguar, the harpy eagle, the maned wolf, and others from the existing list of endangered and threatened species in addition to hundreds or thousands of species that will be eliminated before they are put on the list at the current rate of listing which is abour 60 species per year. (Endangered Species list, 50 CFR 17.11; see, Peter H. Raven, "The Urgency of Tropical Conservation" *The Nature Conservancy News*, January-March 1986, 7-11; Per Ola and

Emily d'Aulaire, "Lessons From a Ravaged Jungle", *International Wildlife*, September-October, 1986, 34-40; Fitzgerald and Meese, *Saving Endangered Species*, Species Listing Analysis, at 11, July 1986. Copies attached).

9. Highway construction that is leading to the deforestation is also the result of direct U.S. agency funding through the Department of State and direct U.S. Army Corps of Engineers Assistance to the Brazilian Corps of Engineers. (World Wildlife Fund memorandum citing Nicolas Guppy, *Foreign Affairs*, 1984.)

10. The Three Gorges Dam project in China has been aided and will be aided by several U.S. Agencies, including but not limited to the "Three Gorges Working Group" members—Army Corps of Engineers and the Bureau of Reclamation, which is submitting designs and providing technical planning assistance for the massive project. (Asia-Pacific People's Environment Network, (newsletter) 21st June, 1986, *Water for the World*, Bureau of Reclamation, (attached).)

11. The Three Gorges Dam project is likely to harm and will undoubtedly affect (the standard for requiring consultation) the endangered Chinese alligator which inhabits the Yangtze River (6 *Grizmek's Animal Life Encyclopedia*, Reptiles, 128, Van Nostrand Reinhold Company, NY, NY.) It will also further endanger the Yangtze River Dolphin, which I understand is under consideration for listing by the National Marine Fisheries Service and already on Appendix I (most endangered) of the Convention on International Trade in Endangered Species of Fauna and Flora.

12. The on-going Mahaweli project funded and assisted by the Agency for International Development and the World Bank in Sri Lanka (See affidavit of Amy Skilbred) will harm many listed species.

13. In April of 1978, John Grandy, then with Defenders, wrote a letter (copy attached) to the Enrionmental Affairs Coordinator of the Agency for International Development concerning the Mahaweli project and the need for the required Section 7 consultation with the Department of the Interior regarding the project. At that time it seemed the AID would officially consult with Interior.

14. In a 1980 memorandum about the Mahaweli Project, the Chief of the Office of Endangered Species reported to the Associate Director of the Fish and Wildlife Service that "no less than eight Endangered and Threatened Species (Indian elephant, leopard, purple-faced languar, toque macaque, red face malkoha, Bengal monitor, muggar crocodile, and python) are found in the project area." The Director notes the fact that AID was "concerned about the continued existance of Endangered and Threatened Species in the area". He also notes that despite AID's refusal to request or submit to a consultation under Section 7 of the Endangered Species Act, AID did plan to take several steps over a period of as much as 10 years to mitigate damage to these and other species. The Director concluded by writing "Our willingness to be of assistance in Endangered species problems does not negate our belief that overseas projects conducted by United States agencies require Section 7 consultation if listed species may be affected." (copy attached).

15. Defenders has consistently supported and sought to strengthen the United States laws and programs protecting wildlife nationally and internationally, particularly the Endangered Species Act and programs authorized and duties required thereunder.

16. Defenders of Wildlife has actively worked for the conservation of foreign species through the U.S. Endangered Act. For example, Defenders has actively reviewed and submitted written comments on the proposed changes in the classification and/or regulations for listed foreign species such as the leopard and the kangaroo. Further, Defenders brought a lawsuit in 1981 challenging Department of the Interior regulations which repealed a 1974 import ban on the hides and meat of kangaroos threatened with extinction.

17. In further example, in 1985, the National Marine Fisheries Service (NMFS) listed the Gulf of California Harbor Porpoise as endangered in response to Defenders' 1978 petition. The Gulf of California harbor porpoise exists only in Mexican waters. Defenders has remained actively involved in the recovery process for the species by persuading Congress to provide funds for fiscal years 1986 and 87 through the Congressional appropriations process for NMFS to plan and conduct recovery efforts on behalf of the porpoise.

18. Defenders has sought to ensure funding to implement the Western Hemisphere Convention through the Congressional appropriations process as authorized in Section 8A(e) and Section 15(d) of the Endangered Species Act.

19. Defenders' staff attended both the negotiating convention held in Bonn, West Germany in 1979 and the first meeting of the parties held in Bonn in 1979 as approved official observers. Defenders played a leadership role in developing a coordinated, worldwide, nongovernmental organization, position paper on the draft CCMA text which was distributed to all the governmental delegations assembled to negotiate the treaty.

20. Defenders' staff has attended and participated in four of the five regular biennial Conferences of the Parties

to CITES as approved official observers. Defenders' unique expertise has often been solicited by governmental delegates at these meetings.

21. Defenders' representative served as a member of the U.S. delegation to the Special Working Group of the Parties to CITES in Geneva, Switzerland in 1977. Most recently, Defenders' representative attended the Technical Expert Committee meeting as an observer this year in Lausanne, Switzerland.

22. Defenders has long kept our members informed about and interested in international wildlife issues through publication of articles on wildlife overseas in numerous issues of *Defenders* magazine. A list of the articles in wildlife in foreign countries and international waters from 1980 through 1986 is attached. (See also ESA Report, Saving Endangered Species, attached, Consultation Section, pp. 22-23.)

23. In the early 1970's, then Defenders of Wildlife Board member Edward Steele launched a campaign to help solve Madagascar's ecological problems which threatened the island's endangered wildlife, particularly the many rare and endangered species of lemurs. In April, 1975, *Defenders* magazine devoted an entire issue to Madagascar's wildlife (copy attached). The first article in the issue was entitled, "Madagascar's Endangered Wildlife". It mentions Dr. Robert Sussman, an anthropologist who is also a lemurologist at Washington University. Dr. Sussman, a Defenders member and recent Board member, has been a leader in the conservation of this wildlife and its habitat and has recently received an award from its government. Any U.S. activity there which encourages the further deforestation of the island is likely to affect these endangered species to the detriment of Dr. Sussman and other Defenders members.

24. After the publication of "Dams" in *Defenders* May/June 86 issue, scores of Defenders members wrote the head of the World Bank protesting Bank funding of such multi-dam projects as the Narmada Valley Project now underway in India. It will include 30 major dams, 135 medium-sized dams and more than 3000 small dams over the next 50 years. The first phase alone will inundate 11% of the Narmada River basin's forests and with them much of the areas wildlife and its habitat. These include 35,000 acres of teak forest, traditionally harvested with the labor of asian elephants. ("Dams", attached and *Bankrolling Disasters*, International Development Banks and the Global Environment, Sierra Club, 1986, copy attached.)

25. Defenders' members include many who enjoy and study in Zoological Parks in the United States endangered and threatened wildlife from foreign countries, such as the asian elephant whose population will be diminished by A.I.D. and other agency actions in asia including Sri Lanka and Thailand as noted in the affidavits of Eliot McClure and Amy Skilbred. To the extent that these elephants and other species become less available for zoos in the U.S. due to their further endangerment overseas, these Defenders membes will be harmed. Captive breeding efforts for many of the species, and thus their conservation, will also be harmed.

26. There is a growing controversy over the lack of investigation, mitigation and conservation efforts undertaken by U.S. agencies concerning actions affecting endangered and threatened species and species which are likely to become so threatened and endangered in foreign countries.

27. The question of whether consultation is required, as finally presented in the final regulation of the Secretary concerning the consultation process under Section 7 of

the Act, is a specific and immediate example or a case in point of that controversy requiring resolution in order to avoid further harm as a result of the U.S. agency actions described in plaintiffs' submissions, among other U.S. actions.

28. The relief the plaintiffs have requested, including the requirement in regulations of the Interior Department that agencies consult with Interior concerning the effects of their actions on threatened and endangered species in foreign countries, will prevent or reduce harm to the very interests the Endangered Species Act was designed to protect, including the interests of Defenders and its members.

29. Defenders of Wildlife and its members will benefit from the reduction in harm and avoidance of jeopardy to and the opportunity for enhanced conservation and of the listed species that the requested consultation between agencies is intended to bring about.

/s/ John M. Fitzgerald
JOHN M. FITZGERALD

District of Columbia) ss.

Subscribed and sworn to before me
this 7th day of November, 1986

/s/ June M. Leartoan
Notary Public
My commission expires 10/14/91

United States Bureau of Reclamation, *Water for the World*[1]

[photograph omitted]

Caption: *"What do we want with this worthless area—this region of savages and wild beasts, of shifting sands and whirlwinds of dust, of cactus and prairie dogs? To what use could we ever hope to put these great deserts and these endless mountain ranges?"—U.S. Statesman Daniel Webster, 1852.*

Civilization began in the arid valleys of the Middle East. Simple irrigation systems brought water to the desert lands, changing them into productive fields and creating a stable agriculutural economy that would nourish the growth of the world's first cities. Irrigated agriculture is as old as history itself, and, time and time again, history has shown that water resources development is really human resources development.

Nowhere is this fact more evident than in the American West. Many early explorers labeled the land as useless, harsh, and uninhabitable, but a few saw the potential of this vast area. John Wesley Powell led the drive to open the West to settlement through the development of water resources. His efforts eventually resulted in the creation of the U.S. Bureau of Reclamation in 1902.

[1 This Bureau of Reclamation pamphlet is printed in French and Spanish as well as English, and contains a number of photographs. Only the English portions of the pamphlet are reprinted here. The photographs are omitted, but the captions are reprinted.]

Today, Reclamation has turned the "useless" lands of the American West into some of the world's most productive farmlands. Water from Reclamation projects supplies approximately 3 percent of the cropland in the United States, yet that land produces 10 percent of the Nation's crops. The towns, cities, and industries that grew up near irrigated lands depend on hydropower from Reclamation projects as a major source of electricity. Many of these same communities also rely on Reclamation projects for their potable water supply. Originally created to bring agricultural water to the arid lands of the western United States, Reclamation has grown and changed over its 80-year history to encompass the entire range of services that have made Reclamation synonymous with water resources development throughout the world.

[three photographs omitted]

Captions:

A basic irrigation system in Pakistan typifies the ongoing need to develop agriculture.

Reclamation irrigation systems, such as the Palo Verde Project in California, led to the growth and development of the American west.

Hoover Dam, a landmark Reclamation multipurpose project, provides water to millions of people for agricultural, municipal, and industrial use and for hydropower generation.

International Accomplishments

Although Reclamation built its reputation in the American West, some of its most outstanding projects lie outside the boundaries of the United States.

Over the years, administrators, engineers, and scientists from more than 115 nations have come to Reclamation for assistance in dealing with their water resources development problems. Reclamation's overseas planning activities have been extensive, with hundreds of volumes of reports produced. Some of the larger studies completed by Reclamation include:

Helmand Valley Development – Afghanistan
The Snowy Mountains Scheme – Australia
Rio Sao Francisco Basin – Brazil
Elqui Valley – Chile
Blue Nile River Basin – Ethiopia
Han River Basin – Korea
Lower Mekong River Basin – Thailand/Laos
Kuala Lumpur Flood Mitigation Project – Malaysia
Rio San Juan Project – Nicaragua/Costa Rica
Lake Chad Basin – Nigeria
Magat River Project – Philippines
Tsengwen Reservoir – Taiwan

The Lower Mekong River Basin Studies in Thailand and Laos illustrate the magnitude of some of these planning studies. Planning for the project took nine years, a resident staff of 35, and over 200 local employees. When the plan was completed, it resulted in a proposal for a dam the size of Grand Coulee with a reservoir that could irrigate 2 million hectares (4.9 million acres). Reclamation also has been involved recently in a number of planning and construction projects overseas.

[five photographs omitted]

Captions:

King Gates Dam is one of the three dams in the Kuala Lumpur Flood Mitigation Project for which Reclamation is providing technical assistance.

Reclamation served as an advisor in the development of the Helmand Valley in Afghanistan.

The governments of the United States and Israel joined in the development of new desalting technology which resulted in this prototype multi-stage flash plant.

A proposed site for Three Gorges Dam on the Yangtze River in the People's Republic of China. Reclamation is providing technical planning assistance for this massive project.

The proposed Three Gorges and Ertan projects could join the Great Wall as landmark civil engineering achievements in China.

Three Gorges Dam – People's Republic of China

One of the first overseas projects which Reclamation helped plan was the Three Gorges Dam, located on China's Yangtze River. By the standards of the day, the project would have been the largest irrigation and hydroelectric power project in the world. Three Gorges Dam would have been a third larger than Grand Coulee Dam and 8 meters (24 feet) taller than Hoover Dam. It would have had a generating capacity three times that of the Grand Coulee, Hoover, and Shasta Dam powerplants combined.

A combination of economic and political problems brought planning for the project to a halt in 1947. All of the records for the project were indexed and stored by Reclamation and the People's Republic of China. Even with the passage of more than three decades, the project would be one of the world's largest single water resources developments.

Provisions of Annex I and II of the Hydropower Protocol, signed in 1979, between the United States and the People's Republic of China effectively reopened the Three Gorges Project. The Hydropower Annex also outlines cooperative programs for technical advice, assistance, and training from Reclamation and U.S. industry on the Ertan Hydroelectric Power Project. The proposed dam and powerplant on the Yalong River will have an installed generating capacity of 3,000 megawatts.

Tank Irrigation Project – Sri Lanka

In stark contrast to the massive Three Gorges Project in China, the government of Sri Lanka, the World Bank, and Reclamation rehabilitated and modernized five small irrigation tank projects in the dry northern zone of Sri Lanka. These five projects serve 12,750 hectares (31,500 acres), but knowledge gained during this work will also be extended to other work on approximately 175 similar projects throughout this island nation, thus helping to stabilize Sri Lanka's entire agricultural economy.

Aswan High Dam – Egypt

Even before the powerplant at the Soviet-built Aswan High Dam along Egypt's Nile River was completed, cracks developed in the plant's turbine runners, resulting in constant operational problems and reduced electrical generation. In 1981, Egypt, the Agency for International Development, and Reclamation joined forces to remedy the problem. In 1982, the Egyptian government signed a contract with an American firm for replacement of the runners and requested that Reclamation serve as its engineering advisor for the nine-year rehabilitation project. The rehabilitated Aswan Dam will then begin a new era of reliable service.

Concurrently, other Bureau of Reclamation representatives are working closely with the Egyptian Ministry of Irrigation in the development of that country's Master Water Plan and in the analysis of existing and planned multi-purpose projects. When completed, the Master Water Plan will serve as a comprehensive guide for developing and managing Egypt's water resources.

Municipal and Industrial Water Development – Saudi Arabia

Reclamation, the U.S. Department of the Treasury, and the government of Saudi Arabia are working together to improve the municipal and industrial water supply of the capital city of Riyadh. Reclamation is providing technical management advice, including reviews of the designs and specifications for a wide variety of projects. Reclamation is also providing additional advice on the construction of a reverse osmosis desalting plant, the development of deep wells, and the expansion of distribution systems designed to provide the growing city with more water.

At the same time, Reclamation is providing program planning for a desalination research and training center in Saudi Arabia. Work at the center will focus on improving the economics of desalination through the development of new techniques, materials, operation and maintenance procedures, and power conservation measures.

[two photographs omitted]

Captions:

Reclamation is advising the Egyptian government in the rehabilitation of the Aswan High Dam powerplant with American-made turbines.

The government of Saudi Arabia is promoting the development, of its water supplies for municipal, industrial, and agricultural purposes with Reclamation assistance.

[three captionless photographs omitted]

Cooperative Science and Technology Program – Spain

Reclamation and Spain, another country with a long history of irrigated agriculture, have joined in an interagency agreement with the Department of State to develop programs to perfect and improve the existing water projects in both the United States and Spain. Six studies designed to improve irrigation efficiency are being monitored by Reclamation in locations throughout Spain. Irrigation management, system automation, and irrigation technology programs are introducing drip and sprinkler irrigation systems, while research in areas such as flood forecasting and weather modification continues as part of a long-term effort to help Spain make better use of its water resources.

Inga-Shaba Transmission Line – Zaire

The world's longest and most powerful electrical transmission line now cuts across Africa's heartland. Reclamation served as technical advisor to the government of Zaire during the more than eight years required to design, build, and initiate operation of the project. Funded by the Export-Import Bank and built by a U.S.-led consortium, the 500-kilovolt direct current transmission line carries power from Inga Dam in the Congo River Basin to the mineral-rich Shaba region of Zaire, a distance of 1,700 kilometers (1,060 miles.)

During the line's construction, Reclamation also trained local workers in operation and maintenance procedures and related management practices.

Small and Medium-Sized Irrigation Projects – Peru

At the request of the Peruvian Ministry of Agriculture and Food, Reclamation completed a detailed technical feasibility review of eight projects scattered throughout Peru. These projects ranged from the rehabilitation and betterment of existing dams and canals to the opening of new irrigated lands. Because of the variety of projects and the diverse geography and economic conditions of the country, a new set of cost benefit analyses had to be prepared and applied.

Working with their Peruvian counterparts, a Reclamation review team prepared guidelines relating to specific needs and conditions in that country. Training in economics, hydrology, soil science, and construction engineering was also given by team members while the project review was under way.

[four photographs omitted]

Captions:

A medium-sized irrigation project near Aycaca, Peru.

The main power station on the Inga River in Zaire provides power for the copper mines 1,700 kilometers away.

Planning advisory assistance for hydroelectric development is another of the services which Reclamation offers.

Reclamation has developed decades of expertise in reservoir design and operation, key aspects of any water supply system.

A Full Spectrum of Services

The Bureau of Reclamation stands prepared to aid friendly nations in every stage of water resources development, from planning new projects to rebuilding existing projects. Among the services Reclamation can offer are:

Multi-purpose development planning for irrigation water, hydroelectric power, municipal and industrial water supplies, flood control, and recreation

Technical advisory assistance and construction supervision for dams, reservoirs, canals, irrigation distribution systems, municipal water systems, powerplants, and transmission lines

Economic analysis

Hydroelectric investigations

Soil classification

Sedimentation control

Dam safety reviews

Salinity control

Desalting research and development

Wind energy systems

Environmental planning

Weather modification

Applied research

[one photograph omitted]

Caption:

Reclamation specializes in the planning, design, construction, and operation and maintenance of irrigation projects in arid and semi-arid climates.

Training Programs

In addition to developing water resources projects throughout the world, the Bureau of Reclamation is also dedicated to developing the human resources required to effectively plan, design, build, operate, and maintain water resources projects. Long-term and short-term programs offered by Reclamation provide technical experience and education for engineers and administrators in every phase of water resources development, use, and management.

Headquartered at Reclamation's Engineering and Research Center in Denver, Colorado, the training program offers participants individually tailored instruction under the direction of the center's staff of engineers, economics, geologists, hydrologists, and agronomists. Participants in the training program can learn the skills required to build and manage water projects through direct field experience at Reclamation projects located throughout the western United States.

To augment the Bureau's long-term training program, one- and two-week seminars on specific water development and management areas are presented periodically. These seminars offer the most current information available in the fields of engineering, planning, operation and maintenance, and safety. Other special short-term visits and tours of Reclamation projects and the Engineering and Research Center can also be arranged.

Financing

Reclamation's overseas activities and training programs are carried out on a fully reimbursable basis.

Interested countries must arrange their own financing through the U.S. Agency for International Development or through international lending institu-

tions such as the World Bank, the Export-Import Bank, and the Inter-American Development Bank.

For detailed information on the procedures for receiving technical assistance from the Bureau of Reclamation, contact:

Office of Foreign Activities (Code 2000)
Bureau of Reclamation
U.S. Department of the Interior
18th and C Streets NW
Washington, D.C. 20240
U.S.A.

[two photographs omitted]

Captions:

Reclamation engineers work with their local counterparts to provide on-site training.

Technical training through individually tailored programs is offered at Reclamation's Engineering and Research Center in Denver, Colorado.

As the Nation's principal conservation agency, the Department of the Interior has responsibility for most of our nationally owned public lands and natural resources.

This includes fostering the wisest use of our land and water resources, protecting our fish and wildlife, preserving the environmental and cultural values of our national parks and historical places, and providing for the enjoyment of life through outdoor recreation.

The Department assesses our energy and mineral resources and works to assure that their development is in the best interests of all our people.

The Department also has a major responsibility for American Indian reservation communities and for people who live in Island Territories under U.S. administration.

DEFENDERS OF WILDLIFE

April 25, 1978

Mr. Albert C. Printz, Jr.
Environmental Affairs Coordinator
Agency for International Development
Washington, D.C. 20523

Dear Mr. Printz:

This letter is in response to your request for our views on the relationship between the ongoing or prospective activities of the Agency for International Development and the requirements of the Endangered Species Act. Specifically, these comments will cover the current situation with respect to elephants in Sri Lanka, and provide recommendations on how conflicts with endangered or threatened species can be avoided in the future.

Review of Law

The Endangered Species Act of 1973 provides guidance for all federal activities concerning threatened or endangered animals and plants or their habitats.

The intent of the Act is not only to provide for preservation of endangered and threatened species but, more importantly, to insure restoration of populations (16 U.S.C. 1532(11)) of endangered and/or threatened species to non-endangered-non-threatened levels. This is made clear in the definition of "conserve" (16 U.S.C. 1532(2)) and other appropriate parts of the Act. That this definition and its directions for restoration apply to the activities of the Agency for International Development and other agencies working at the international level is clear from other parts of the Act, notably 16 U.S.C. 1531(b) and 16 U.S.C. 1536.

The latter section, often referred to as Section 7 of the Act, provides, then, a dual mandate. Not only does it establish a "do not jeopardize" standard for relevant agency actions, but it also requires that each federal agency utilize its authority to carry out programs for the conservation (restoration) of endangered and threatened species.

Defenders of Wildlife, the World Wildlife Fund, and other conservation organizations strongly support this and other portions of the Endangered Species Act.

Endangered or Threatened Species in Sri Lanka

The case of the endangered Indian elephant in Sri Lanka provides a specific example against which to interpret this law and formulate overall policies for the future.

Indian elephants exist both in Sri Lanka and other regions of the Far East. However, the population of Indian elephants existing on Sri Lanka is a "species" within the meaning of the term (16 U.S.C. 1532(11)) in the Endangered Species Act. Thus, for legal purposes, the population of the Indian elephant on Sri Lanka is endangered in its own right and must be restored regardless of the status of Indian elephants in some other part of the world.

This does not mean that the contemplated development projects for Sri Lanka cannot necessarily be conducted. However, it does mean that certain procedures must be followed:

1. A.I.D. must critically evaluate the projects in light of the above-mentioned requirements of the Endangered Species Act. With respect to the effects on the Indian elephant, experts like Dr. Eisenberg must be consulted. In addition, the Department of the Interior must be consulted as prescribed in Section 7.*

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* We are pleased by reports that these consultations have already been initiated by A.I.D.

In any event, it is clear that A.I.D. must bear the burden of showing that the projects, if allowed to go forward, will be in compliance with the relevant provisions of the Endangered Species Act.

2. If the projects are found to be permissible under the Act, A.I.D. should use its authority to insure that its efforts in Sri Lanka lead to "conservation" (restoration) of Indian elephants and other resident endangered species. Such action would most assuredly involve having as a necessary part of the projects certain substantial actions such as agreed and enforceable land use controls or designation and purchase of wildlife refuges or parks where the elephants and other endangered species would receive protection in perpetuity. A.I.D. would certainly need to bring these opportunities to the attention of Sri Lanka, and would be able to use authority for these programs contained in the Endangered Species Act and Section 118 of the Foreign Assistance Act, as amended.

Guidelines for the Future

In our view, the above recommendations, when generalized, constitute a necessary and probably sufficient model for future operations of A.I.D. that involve threatened or endangered species. As a general operational plan, A.I.D. should:

1. Evaluate each potential project in relation to naturally occurring populations of wildlife. If endangered or threatened species are present in the proposed project area, A.I.D. has an affirmative burden of showing that the project will not violate the relevant portions of the Endangered Species Act of 1973 before allowing the project to be initiated.

2. Proposed projects should be evaulated in relation to their potential effect on rare, depleted, or localized endemic wildlife populations in the proposed project area. This would be necessary in order to insure that such "species" would not become endangered or threatened due to conditions associated with or caused by carrying out a proposed project.
3. In the event that projects are approved in areas in which endangered, threatened, rare, depleted, or localized endemic wildlife populations are present, A.I.D. should work cooperatively with foreign governments and utilize its existing authority to insure the establishment of parks, wildlife refuges, and/or suitable land-use controls so as to insure preservation and restoration, as appropriate, of such species. Establishing such parks, wildlife refuges, or enforceable land-use controls must be considered a necessary part of a proposed project, without which the project could not be allowed to go forward.

We suggest that the recommendations we have outlined above should be promulgated as standards by which to evaluate projects as soon as possible. These standards will present an opportunity for A.I.D. to participate in a meaningful way in preserving the cultural and wildlife heritage of developing nations. As such, the regulations will hopefully help other nations to preserve natural ecosystems and associated values, while permitting necessary and compatible economic development.

We are pleased that A.I.D. has taken the initiative to properly implement the provisions of the Endangered Species Act of 1973. We also commend you for having

assembled the group of knowledgeable conservation leaders to advise on the necessary steps to assure compliance with the law. And we suggest that an additional meeting of the working group be called promptly to discuss implementing the suggestions made in this letter.

Sincerely yours,

/s/ Thomas E. Lovejoy

THOMAS E. LOVEJOY
World Wildlife Fund

/s/ John W. Grandy

JOHN W. GRANDY
Defenders of Wildlife

cc: Don King
Cameron Saunders
Keith Schreiner
Larry Mason
Foster Knight
Lee Talbot
Eldon Greenberg
William Ackerman
Paul Weatherly
John Eisenberg
Other interested parties

April 7, 1980

Memorandum

To: Associate Director – Federal Assistance

From: Chief, Office of Endangered Species

Subject: Accelerated Mahaweli Project (AMP)/United States Agency for International Development (AID) Program to Develop the Water Resources of Sri Lanka

AID is participating, together with the World Bank, Canada, and European donors, with the government of Sri Lanka to develop the water resources of Sri Lanka's major river, the Mahaweli Ganga. This project (actually 12 projects together – see map A) will be funded at 2.3 billion dollars over the next 10 to 30 years. It will bring approximately 117,000 hectares (1 hectare equals 2.43 acres) of sparsely settled land under irrigated agricultural production and will result in the resettlement of more than 450,000 people.

AID is assisting the government of Sri Lanka in financing the design, construction, and supervision of the main and major branch canals in System B (see Map B) of the AMP. System B will irrigate 50,000 hectares of land and provide for the settlement of 40,000 farm families (about 224,000 people).

No less than eight Endangered and Threatened Species (Indian elephant, leopard, purple-faced languar, toque macaque, red face malkoha, Bengal monitor, mugger crocodile, and python) are found in the project area. The Sri Lankan government has requested the assistance of AID in mitigating the negative impacts to the wildlife involved. This calls for relocation of wildlife and the establishment of national parks.

AID, in a memorandum to you dated February 1, 1980, reiterated their belief that Section 7 of the Endangered Species Act does not apply to United States Agency actions in foreign countries. The memo goes on to state "never-the-less, AID is concerned about the continued existence of Endangered and Threatened Species and intends to conduct its operations with due regard for such species. Since the Fish and Wildlife Service (FWS) has the greatest amount of expertise within the United States Government regarding such species, AID would appreciate having an opportunity to discuss with FWS planning for the detailed design of the project." On January 29, 1980, representatives of the FWS; you, David Wesley and Richard Mitchell and Byron Swift of the Interior's Solicitors Office met with AID to discuss our possible involvement with the AMP. The FWS was asked for recommendations on how to minimize the negative impacts on Endangered and Threatened Species found within System B.

After consulting with a number of experts, including Walter Auffenberg and Wayne King, Florida State Museum, Gainesville, Florida; John Eisenberg and John Seidensticker, National Zoological Park, Washington, D.C.; Howard "Duke" Campbell, National Fish and Wildlife Laboratory, Gainesville, Florida; F.R. Fosberg, Smithsonian Institution, Washington, D.C.; Staff members of Branch of Management Operations and Branch of Biological Support/OES, it was decided to hold a second meeting with AID.

On February 28, 1980, representatives from the Branch of Management Operations, OES (Jack Edmundson, Richard Mitchell, Len West, and Stephen Tonjes) met with AID/Asia staff (Mike Demetre and Jane Stanley) to discuss the impacts that the Accelerated Mahaweli Project will have on Endangered and Threatened species in Sri Lanka.

The final Environmental Assessment of the Mahaweli Basin Development Phase I (including Maduru OYA-System B design) by TAMS of New York should be completed by the end of June. AID plans to let the contract for the design and supervision of the canal system by August. Mr. DeMetre's office has been asked to prepare a Wildlife Project report which is due by April. His office wishes the assistance of the FWS in preparing recommendations for the management of the wildlife found in the area.

AID will provide monetary assistance to the Sri Lanka Wildlife Department and has appropriated 400,000 dollars in FY81 for assisting, training and equipping the staff of the Wildlife Department. Up to 1 million dollars is committed for wildlife management with the possibility of 8 million dollars over a long-term period (5-10 years).

AID will produce a Project Identification Document (PID) by mid-summer and has asked for our technical opinions. They wish to have a long-term advisory relationship with the FWS. The OES team answered questions on the possibility of translocating herps (snakes, monitors, crocs), fisheries problems with the damming of the river and what the long-term problems of deforestation/development has on wildlife. AID wishes to continue to discuss the project with our office.

AID has made it clear that their request for assistance is not a request for Consultation under Section 7 of the Endangered Species Act. We are eager to provide the assistance requested and to open up avenues to provide assistance on other projects. We feel this is an important step in the conservation of listed species. Therefore OES will make recommendations to AID as to ways to minimize or eliminate the negative impacts to Endangered and Threatened species. Our willingness to be of assistance in Endangered species problems does not negate our belief that overseas projects conducted by United States agencies require Section 7 consultation if listed species may be affected.

John L. Spinks, Jr.

DAMS: They are destroying habitat and wildlife along many of the world's rivers

by Edward Goldsmith and Nicholas Hildyard
[from *Defenders*, May/June 1986]

Since the beginning of the historical era, man has been building dams. The ancient civilizations of Sumeria, Babylonia, Egypt, Ceylon and Cambodia, for example, were all justifiably famed for their irrigation works. Indeed, the embankments and tanks that remain at such ancient capitals as Anuradhapura in Sri Lanka and Angkor Wat in Cambodia still survive to bear proud witness to the engineering skills of those who constructed them. Today, however, advances in concrete technology and the development of vast earth-moving machines (the largest weighing 2,000 tons) have enabled us to build dams of a size and complexity that would have staggered the ancients.

The statistics speak for themselves. In Egypt, the Aswan High Dam is 17 times heavier than the great pyramid of Cheops. In Ghana, the Volta Dam is large enough to impound a reservoir covering 8,500 square kilometers – five percent of the total area of the country and an area almost the size of Lebanon. In Brazil, plans to harness the power of the Amazon and its tributaries with a complex of dams capable of providing 66,000 megawatts of electricity will entail flooding an area the size of Montana.

Still more ambitious is the proposed Sanxia or Three Gorges Dam on China's Yangtze River. This huge dam, the biggest yet, is projected to cost between $10 billion and $20 billion, flood a vast expanse of agricultural land displace between a million and 3 million people.

With funding now available from such institutions as the World Bank and the various international aid agencies, the pace of dam construction has accelerated dramatically since the Second World War. Significantly,

[photograph omitted]

Caption: *India's Sardar Sarovar Dam under construction on the Narmada River. On an earthquake fault, it required a 95-foot-deep concrete foundation.*

the very first loan ever made by the World Bank to a developing country – to Chile in March, 1948 – was for an irrigation and hydropower scheme. By June, 1982, the bank had lent $26.7 billion for agricultural projects, of which $10 billion went to financing no fewer than 285 irrigation projects. About 38 percent of the money advanced by the bank for agricultural development schemes has been for irrigation projects – and 90 percent of that lending has occurred during the last ten years.

The worldwide total of dams more than 150 meters high is expected to reach 113 by 1990; of these, 49 will have been built during the 1980s. In the Philippines alone, an estimated 861 dams are in the offing. Thirty-nine are already in operation, 12 are under construction, and 177 are awaiting construction. A further 31 are being studied, and more than 361 have been identified for study. Feasibility studies have been completed on 12 and tentative planning studies are under way on another 229.

Even more impressive than the dams themselves are the vast reservoirs whose waters they serve to impound. In 1970, there were at least 260 man-made reservoirs with a surface area of 100 to 1,000 square kilometers, and 40 with a surface area of more than 1,000 square kilometers. The volume of water stored in those reservoirs – some 4,000 cubic kilometers – has been estimated to be "approxi-

mately equal to one-third of the water of the earth's atmosphere." Small wonder, perhaps, that the reservoirs behind today's "superdams" are said to be the only man-made structures on this planet that are clearly visible from space.

For the future, even more ambitious schemes are planned, many of which involve the diversion of whole rivers, the transfer of water from one river basin to another and, even, the reversal of the flow of rivers.

In the Soviet Union, plans are afoot to build the Siberian Diversion Scheme, which involves blocking the flow of the River Ob and pumping its water via a canal through Kazakhstan in order to irrigate land 1,500 kilometers away. The water will eventually be flushed into the Aral Sea, where the water level is already sinking due to the demands of industry and irrigation, and the salinity is seriously increasing. The initial investment is expected to be at least $41.6 billion. Closer to the capital, there are plans to dam the Pecara River to the northeast of Moscow in order to transfer water to a southern tributary of the Volga.

In China, a canal is to be built to divert water from the Chang Jiang (Yangtze) River to agricultural areas in the arid north of China. Three possible routes have been proposed: a western route, a middle route and an eastern route. The western route has never been properly surveyed; the eastern route was surveyed in detail in 1978 and the middle route in 1979. At the time of writing, the middle route appears to be favored. It will require the construction of a 1,265-kilometer canal to Beijing, which will cross the Huang He River just west of Zhengzhou and then pass through the Nanyang Basin in Southern Henan. The scheme is expected to irrigate 3.8 million hectares of farmland and to guarantee regular water supplies to a further 1.3 million hectares. Almost 7.4 cubic kilometers of

water will be provided for industrial, mining, municipal and domestic uses. Giant pumping stations are also to be built to drain excess water from an area of 18,000 square kilometers at a rate of 5,000 cubic meters a second.

EQUIVALENTS OF SOME METRIC MEASUREMENTS USED IN DAM BUILDING

LENGTH

kilometer = 0.621 mile
meter = 39.370 inches

AREA

square kilometer = 0.386 square mile
hectare = 2.471 acres

VOLUME

Cubic kilometer = 0.239 cubic miles
cubic meter = 35.314 cubic feet

In India, a series of canals is being built to divert water from the Brahmaputra, Ganges and Indus Rivers to the drought-prone regions of Madhya Pradesh in central India, Rajasthan in the west and Tamil Nadu in the south. Those canals will "radiate" out from the 2,000-mile Ganges/Cauvery River Canal, which will run down almost the entire length of the country.

In the United States, similar schemes include the Texas Water System and the NAWAPA Project. The latter (the North American Water and Power Alliance—hence its acronym) would channel water from Alaska and Canada in order to irrigate Mexico and the southwestern United States, at a cost of some $2 trillion. An area of 1.3 million square miles would have to be drained; 177 lakes and

reservoirs would need to be built: and the scheme would require the cooperation of three nations, 36 states, 11 provinces and thousands of cities.

The Texas Water System, as originally conceived in 1968, involved transferring water from the humid eastern region of Texas to the arid and semiarid western region of the state—in addition to "importing" massive amounts of water from the Mississippi Basin via the state of Louisiana. "The key to the Texas Water System," writes Charles Greer of Indiana University, "is a series of reservoirs on the major rivers of east and central Texas, which drain into the Gulf of Mexico. Ultimately the system of reservoirs, large and small, would be more than 200 in number. The role of these reservoirs in the Texas Water System would be to store water, from the rivers of East Texas as well as from out-of-state imports, prior to conveyance through two major canal systems: the Coastal

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[photograph omitted]

Caption: *Workers bag leaves for cigarette wrappings at India's Tawa River Dam, part of the Narmada Valley complex.*

Canal System and the Trans-Texas Canal System." Together, these two canals make up the Texas Water System. The coastal canal "would extend approximately 600 kilometers southwęstward, flowing by gravity from the Sabine River on the eastern edge of Texas to the southern tip of the state." As for the Trans-Texas Canal, it would extend "about 1,200 kilometers westward from the Upper Sulphur River basin in northeast Texas." Although

the original plan was turned down by a local referendum in 1969, a revised version (no less ambitious) has been proposed.

There is little doubt that at least some of those involved in building the massive "water development" projects described above sincerely believe that they are improving the lot of mankind. In 1975, the former commissioner of the U.S. Bureau of Reclamation, Gilbert G. Stamm, told a congressional committee: "Water resource projects have many positive environmental effects. When water management practices regulate and augment low flows of rivers and streams, decrease erosion, prevent floods, eliminate waste of water and in many instances change deserts into gardens where man can comfortably live and prosper, the result is betterment of environmental conditions."

In a similar vein, the U.S. Army Corps of Engineers assured the American public in a 1977 publication that by building dams, it aimed "to preserve the unique and important ecological, aesthetic and cultural values of our national heritage; to conserve and use wisely the natural resources of our nation for the benefit of present and future generations; to restore, maintain and enhance the natural and man-made environment in terms of productivity, variety, spaciousness, beauty and other measures of quality . . . and to create new opportunities for the American people to enjoy the environment and the use of natural resources."

Indeed, reading the official literature on large-scale dams and other water development projects—that is to say, the literature put out by the dam-building industry—one might be forgiven for thinking that such projects can bring nothing but good for mankind. Little mention is made of their social, let alone their ecological, impact. (A 1982 report by the International Commission on

Large Dams, for instance, makes only one reference to the likelihood of irrigation schemes' causing salinization, a problem which is putting hundreds of thousands of acres out of production every year.) Instead, we are presented with a long and growing list of the benefits to be accrued from developing the rivers of the world, benefits ranging from ensuring supplies of potable water (a critical condition for the majority of the Third World countries, where unhygienic water supplies are a major cause of disease) to creating jobs and controlling floods.

Title: The inevitable loss of wildlife due to the flooding of forests, agricultural land and brush is rarely cited as a reason for preventing the building of a dam. At times the indifference shown by officials is astounding.

[8 photographs omitted]

Caption: *Far left: A Yangtze tributary, the Huangbo River, now is backed up by the Gezhouba Dam, a regulating dam for the giant Three Gorges project. The view is from a cave used as a retreat by poets and mystics during the Tang Dynasty, 618 to 907 A.D. Habitat of the Malaysian flying lemur and the green peafowl of Thailand, both rare species, is theatened by dam proposals. Pages 22-23: Work on a coffer dam for the Gezhouba Dam suggests the vastness of the change planned for the Yangtze basin. Built of steel plates and piles, the coffer dam temporarily will hold back the river while concrete is poured for the main dam. Photo by Baruch Boxer.*

Other than birds, and possibly a few alert mammals, how many animals really stand a chance of 'relocating' themselves when the waters come their way? How much adjoining forest is there for them to move into?

[photographs omitted]

Caption: *Dam-building on Sri Lanka's Mahaweli River, aided by the World Bank, will adversely affect habitat of such species as the estuarine crocodile and the endangered Indian python.*

But, most important of all, dams and other water projects are seen as having a vital role to play in ensuring future economic development. By supplying hydroelectricity, dams supply "the power to progress." And by providing water for irrigation, they will help boost food production – and thus, it is argued, enable more people to be fed. These are the two *major* benefits claimed for large-scale water development projects. Given that food and energy are the two commodities in shortest supply throughout the Third World, is it any wonder that so many developing countries now see large-scale dams as the touchstone of future prosperity? In a world where millions go to bed hungry and where few have access to even the cheapest material goods that we take for granted in the West, a demand that the further building of large-scale dams should cease forthwith must sound churlish. Would not doing so effectively condemn still more people to death by starvation? And if the experts insist that dams provide the route to material prosperity for impoverished millions, who are we to gainsay them?

But there is another aspect to the dam-building issue, one that the industry is less than keen to display. It includes massive ecological destruction, social misery, and increasing ill-health and impoverishment for those very people who are expected to benefit most. Little of the extra food grown through irrigation schemes ever reaches

those who need it most. In the long run, those irrigation schemes are turning vast areas of fertile land into salt-encrusted deserts, and the industry powered by dams is further undermining food supplies through pollution and the destruction of agricultural land. Millions of people have been uprooted from their homes to make way for the reservoirs of large dams; their social lives have been shattered and their cultures destroyed; and their health has been jeopardized by the water-borne diseases introduced by those reservoirs and their associated irrigation works. Dams are now suspected of triggering earthquakes, have failed to control floods and have actually served to increase the severity of flood damage. In many instances they have reduced the quality of drinking water for hundreds of millions of people. The real beneficiaries of large-scale dams and water development schemes have invariably been large multinational companies, the urban elites of the Third World and the politicians who commissioned the projects in the first place.

When a dam is closed, the waters of its reservoir begin to rise, submerging vast areas of land. Often the area flooded contains thousands of acres of good agricultural land. In Sri Lanka, for example, the Victoria Dam (part of the giant Mahaweli Project) will, according to L. Alexis, "destroy 3,000 acres of land cultivated with paddy, tobacco, vegetables and other food crops; 2,000 acres cultivated with mixed fruit, cocoa, coffee, coconut, spices, tubers and soft wood in village gardens and homesteads; and 2,000 acres in big and small estates of cocoa, coffee, pepper, rubber, coconut, sugar cane and soft wood."

Figures are not available for the total worldwide loss of farmland to dam projects, but the number of people who have had to be resettled as a result suggests the productivity of the lands they previously occupied which have now been flooded. In India, for example, the Srisailam

Hydroelectric Scheme near Hyderabad flooded some 107,000 acres of farmland, land which, until the dam was closed, had provided a livelihood for some 100,000 people. Discussing that loss of agricultural land, the Fact-Finding Committee on Srisailam Project Evaluations notes: "The agricultural economy of the region was considered to be highly prosperous. The lands, both dry and wet, situated along the Tungabhadra and Krishna rivers were highly fertile and the cropping patterns adopted by the farmers were both remunerative and profitable. Not only food crops such as paddy, wheat and redgram, but also commercial crops such as groundnut, tobacco, chillies and cotton were grown extensively in the areas which have been submerged. The level of food production in these areas was quite high as the soil and the climate were very favorable to agriculture. Thus, the submersion of 107,000 acres caused an enormous amount of loss and hardship to the local villagers."

In addition to causing the loss of agricultural land, dams have also caused the drowning of thousands of acres of forest. It is estimated, for example, that between 1950 and 1975, India lost 479,000 hectares (1.2 million acres) of forest land to various river valley projects.

For the promoters of large-scale dams, the loss of forests is generally seen only in economic terms—that is, in terms of the actual market value of the timber submerged. "Officials totally ignore the *intangible* ecological value of such benefits as soil preservation, water replenishment, climatic stabilization, air purification or wildlife shelter," comment the authors of a recent report on India's grant Narmada Valley Project. This scheme involves the building of 30 major dams and will itself drown some 150,000 acres of forest, including 35,000 acres of teak forest. Indeed, the report goes on to note, if the intangible benefits provided by trees were taken into account, then—

in the estimation of India's prestigious Forest Research Institute – every tree should be valued at an economic worth of 100,000 rupees per 50 years of life.

We are also reminded that forests provide benefits that cannot be given an economic value. "Even if the intangible ecological benefits are quantifiable, the social value of forests is not. Yet, for the [indigenous tribal groups] the forest is of great cultural and psychological importance, and its destruction represents a serious disruptive event. Moreover there is no way of calculating the loss of the economic and genetic potential of a forest, for there may be dozens of hundreds of species which have not been . . . even identified."

The inevitable loss of wildlife due to the flooding of forests, agricultual land and bush is rarely cited as a reason for preventing the building of a dam. Indeed, at times the indifference shown by officials to the fate of those natural species that will be drowned by a dam's reservoir is astounding. We quote again from the report cited above on India's Narmada Valley Project: "Characteristically, there is no plan to relocate the wildlife [in the threatened area]. When we asked officials about this, they stated there would be 'natural relocation' – that is to say, the animals would move out of the area to be flooded by themselves. Such an assumption, however, seems to us to be more of a sick joke and a convenient excuse than a serious proposition. Other than birds, and possibly a few alert mammals, how many animals really stand a chance of 'relocating' themselves when the waters come their way? How much adjoining forest is there, anyway, for them to move into? Will not such a movement increase competition between animals (especially the strongly territorial ones) in the new habitat? And, if one includes wild flora in the category 'wildlife,' how on earth

are all the plants going to 'naturally relocate' themselves? Or, for that matter, the microorganisms?

[three photographs omitted]

Captions:

The Mahaweli project will destroy a migration route and vital feeding grounds of imperiled Asian elephants.

Gaur herds inhabiting southern India's Silent Valley were spared destruction of their habitat when plans for damming the valley were scrapped in the face of public opposition. Malaysian conservationists also were successful in stopping a Tembeling River dam that would have flooded Taman Nagara National Park, forest home of Malayan tapirs like this mother and her young.

"Incredibly enough, for some government departments 'wildlife' seems to mean only tigers and deer and other big mammals. In answer to a query from the Department of the Environment, the Government of Gujarat says, 'At present, there is no wildlife in the reservoir area of the proposed Sardar Sarovar Dam and its vicinity.' The sick joke continues. To the very next question, the reply is: 'After construction of the dam and the creation of the reservoir, it will be possible to develop a wildlife sanctuary or safari park in the vicinity.' Where, pray, is all the wildlife suddenly going to come from? When it comes to costs, there seem to be none; when it comes to benefits, there are suddenly a lot. And, when asked to specify rare and endangered species, as well as fish and crocodile breeding grounds, in the submergence zone, the Gujarat Government has kept silent. Why?"

At a time when experts warn that 20 percent of the world's animals and plants could be extinct by the end of the century as a result of poaching and illegal trading *alone*, the indifference of Third World and industrialized governments alike to the fate of their wildlife is alarming. Underlying that indifference is the widely held view that "conservation" is somehow the concern only of the rich and the indulgent.

To those committed to the idea that industrial development offers the panacea for such ills as poverty and malnutrition, the very thought that the interests of wildlife should take precedence over the requirements of development is inconceivable. Small wonder, then, that proponents of India's controversial Silent Valley Dam (which, if it goes ahead, would flood one of the few remaining tracts of tropical rainforest in India and condemn the last surviving colony of liontailed macaques to extinction) chose to denigrate their opponents as "monkey lovers" who would deny their fellow men the "fruits of progress" for the sake of "a few wild animals."

At best, it is assumed that the interests of wildlife can be protected by striking some sort of balance between conservation and development. Under pressure from environmentalists—and, perhaps more to the point, the tourist industry—many Third World governments have set up national parks and wildlife sanctuaries in order to safeguard the future of their wildlife. Such parks, however, have failed miserably to stem the loss of wildlife to development. Slowly but surely, the enclaves have been whittled down in size as their lands have been encroached upon for "projects in the national interest." Eventually, the parks exist in the name only.

The dam-building industry and its government sponsors have shown few qualms about siting projects in "protected" areas. For example, the Thai government insists on

its right to build the Nam Choan Dam on the Kwae Yai River even though the dam will flood approximately four percent of the Thung Yai Wildlife Sanctuary. That sanctuary, together with the adjacent Huai Kha Khaeng Sanctuary, makes up a forested area of some 4,800 square kilometers. Today it is the most valuable remaining wildlife park in Thailand, a country which, in recent years, has been subject to devastating deforestation and habitat destruction.

If the dam is built, the whole area will be divided in two. Moreover, warns Philip Round, the staff ornithologist of the Association for the Conservation of Wildlife in Thailand, the resulting "development" will almost certainly bring "a flood of illegal settlers along the access road into the heart of the sanctuary area, which will bring attendant problems of large-scale deforestation and poaching." Such illegal settlers have already wrought havoc in the Salak Phra Wildlife Sanctuary (downstream from the proposed Nam Choan scheme), where the Srinakarin Dam already stands as a stark reminder of the Thai government's "commitment" to preserving the integrity of its national parks. If the Nam Choan Dam goes ahead, then the largest population of Asian elephants in Thailand, as well as other threatened species such as the guar and the tapir, could face destruction. Flooding the area could also lead to the destruction of the riverine habitat of the rare green pea fowl, a species that has already been eliminated from 95 percent of the country.

In Sri Lanka, the project area for the Mahaweli scheme contains parts of the Pollunnaruwa, Seruwila and Allai wildlife sanctuaries. Already, the building of the Mahaweli dams has led to the logging of the Somawathie Wildlife Sanctuary (which covers an area of 22,275 hectares) by the State Timber Corporation. A further 30,000 hectares of forest elsewhere have also been earmarked for

logging. The scheme will seriously disturb valuable wetland habitats along the banks of the Mahaweli. More than 50 *villus* (the Sinhalese term for the pools that accumulate in the flood of plains of rivers) will be flooded, the affected areas ranging from 10 to 900 hectares in size. Those *villus* are extremely productive biologically, and their vegetation provides an important source of grazing for wildlife. During the wet season, wildlife moves from the inundated flood plains to higher ground, but it returns to the *villus* with the beginning of the dry season.

Not surprisingly, the Mahaweli scheme will seriously affect the habitat of many animals, including the Indian elephant, the leopard, the red-faced malkoha (which is endemic to Sri Lanka), the swan crocodile, the estuarine crocodile, the Bengal monitor and the python. The project will also seriously reduce the habitat of a number of threatened species, such as the purple-faced langur and the toque macaque, both endemic to Sir Lanka. In particular, the project is likely to prove disastrous for Sri Lanka's dwindling elephant population. Eight hundred elephants are said to inhabit the project area, and an important migratory route will disappear when the dams are closed. In addition, some eight species of fish, four species of amphibians, 19 species of reptiles, eight species of birds, three species of mammals and 53 species of plants – all endemic to the island – will be threatened by the scheme.

In North Perak, northern Malaysia, the Temenggor Dam has drowned valuable forests, threatening the survival of 100 species of mammals and 300 species of birds. Most of these species are already near extinction. Most severely affected have been the Sumatran rhinoceros, the Malayan tapir, the Malayan elephant and the flying lemur.

Had it not been for the efforts of local conservationists, the Malaysian government would almost certainly have gone ahead with plans to dam the Tembeling River in the

Taman Nagara National Park, the only national park in northern Malaysia. The dam would have created a 130-square-kilometer lake and would have destroyed the habitat of a number of species, including the highly threatened Sumatran rhinoceros, the Malayan tiger and the Malayan tapir. All this to add a mere 2.9 percent to the country's total energy capacity.

Not only in the Third World have governments been less than receptive to conservation. The Tasmanian government, for instance, was utterly determined to go ahead with its plans to dam the Gordon and Franklin Rivers although the area had been declared a heritage site. The proposed dam was halted only after the Australian federal government took the State of Tasmania to court. Peter Thompson, of the Australian Conservation Foundation, describes what would have been lost if the dam had been built: "The vegetation of the Gordon and Franklin Rivers is a mosaic of rainforest, wet schlerophyll, scrub heathland, sedgeland and bog communities. The rainforests are composed of species such as myrtle (*Nothofagus cunninghamii*), sassafras (*Atherosperma moschatum*), leatherwood (*Eucryphia lucida*) and the now rare Huon pine (*Dacrydium franklinii*). Many of these species are loosely related to temperate rainforest species in New Zealand and Chile and it is supposed that they have common origins on the supercontinent of Gondwanaland." As originally proposed, the dam would have destroyed more than one-third of the Huon pine habitat.

Discussing the general effects of dams on wildlife, J. E. Bardach and B. Dussart note that "most species of large and small game have territories, home ranges and feeding circuits associated with the main stream of a river or its tributaries." It is this habitat, of course, that a dam floods. Since most animals "cling tenaciously to their home

grounds, the arrival of [the flood waters] spells death for most territorial creatures."

Unfortunately, where efforts have been made to rescue wildlife before a river is flooded—as was attempted in "Operation Noah," before the closing of the Kariba Dam—they have proved of limited success. Even if individual animals in the area to be flooded are rescued, few will be able to breed, since they can do so only in a river valley like the one from which they have been driven. The same is true of those bird species that manage to escape drowning: a few will fly away, but once their natural habitat has been destroyed, their future breeding prospects are slim.

We must also remember that as "development" proceeds, the number of suitable habitats to which wild animals can be transferred is sharply reduced. Eventually, the wildlife has nowhere to go, and game wardens have little option but to slaughter displaced animals in vast numbers. For example, the present plan to build another huge dam on the Zambezi River (this time at Mutapa

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[three photographs omitted]

Caption:

Large dams have inundated habitat, reduced prey species and restricted territory of lion prides in Africa and leopards like this solitary young male in a Sri Lankan national park.

The proposed Mutapa Gorge dam on Africa's Zambezi River will shrink habitat of the endangered giant eland, dependent on floodplain grassland.

Gorge) in order to produce 500 megawatts of electricity will drown 130,000 hectares of giant mahoganies, acacia woods and lush savannah. That land is dotted with perennial watering holes that are vital to local wildlife. Because of the lack of suitable habitats elsewhere, inundation will force game wardens to slaughter at least half of the area's present population of elephants, buffaloes, lions, leopards, elands, sables and other animals.

At present, the argument in favor of conservation that is most likely to make any impression on government planners is an economic one—the claim that wildlife must be preserved for the sake of the tourist industry. That argument is being used by the well-known environmentalist Dick Pitman in his efforts to prevent the flooding of the Mutapa Gorge. Other points out that a large population of herbivores inhabits the savannahs and grasslands that are so often flooded by dams. If ranched, these animals could provide as much food as the fisheries developed in the artificial lakes that will drown them.

Such arguments have so far failed to impress the politicians. Indeed, the idea that the future of man is linked with that of such species as the lion or the elephant—let alone the termite or the snail—is still alien to the most influential of today's development planners. Yet, as Paul and Anne Ehrlich point out in the book *Extinction*, the very subtlety of the relationships among the species in a natural ecosystem makes it impossible to predict whether or not any one species can be lost with impunity. To be sure, throughout history, animals have become extinct, but who knows which new extinction will prove fatal to the survival of life on this planet?

To make the point, the Ehrlichs use the analogy of an airplane passenger who boards his airplane only to find that engineers are busily removing the rivets from the wings. "Don't worry," they tell him cheerfully, "we've lost

numerous rivets in the past—and nothing disastrous has happened." Who, ask the Ehrlichs, would consider traveling on such an airline? Yet, they point out, our indifference to the fate of wildlife suffers from the same flawed thinking as that of the rivet-poppers. How many more animal "rivets" can be popped without causing the destruction of "spaceship earth"? □

Edward Goldsmith and Nicholas Hildyard are editors of The Ecologist, bimonthly magazine of the Wadebridge Ecological Centre in Cornwall. This article is adapted by permission from part of The Social and Environmental Effects of Large Dams, *to be published in May by Sierra Club Books, copyright © 1984 by Edward Goldsmith and Nicholas Hildyard.*

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-757

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, AND THE HUMANE SOCIETY OF THE UNITED STATES, PLAINTIFFS,

VS.

DONALD P. HODEL, AS SECRETARY OF THE INTERIOR, DEFENDANT

AFFIDAVIT OF JOYCE M. KELLY

District of Columbia) ss.

Joyce M. Kelly, being duly sworn, states:

1. I am President (Chief Executive Officer) of Defenders of Wildlife.

2. I have over a decade of professional experience in the management and conservation of natural resources including in part, directing the Wilderness Program of the Bureau of Land Management of the United States Department of the Interior.

3. I make this affidavit of my own knowledge and, if called upon to testify, could testify to the matters herein.

4. I visited Israel and Egypt in May of 1986. As I intended, I enjoyed and observed the habitat of the en-

dangered Eurasian peregrin falcon and hoped to see that species and others including the endangered nile crocodile there.

5. I will suffer harm in fact as the result of American aided development in these countries including the Bureau of Reclamation's nine-year role (1982-91) in overseeing the rehabilitation of the Aswan High Dam on the Nile in Egypt and the development by the Bureau with Egypt's Ministry of Irrigation of the Master Water Plan. This plan will be "a comprehensive guide for developing and managing Egypts water resources." (*Water for the World*, Bureau of Reclamation, attached, p. 8) I have observed the traditional habitat of the endangered nile crocodile there and and intend to do so again, and hope to observe the crocodile directly. I appreciate its existence in the Nile River system.

6. I plan to return to Egypt and Israel and plan to go to South America also with the intention of studying endangered and threatened wildlife in those areas.

DEFENDERS' INTERESTS

7. To achieve Defenders of Wildlife's chief goal "to preserve, enhance and protect the natural abundance and diversity of wildlife including the integrity of natural wildlife ecosystems", Defenders' Board of Directors on April 30, 1983 adopted a general policy statement which included the strategy of addressing "international issues primarily through the avenues of influence provided by domestic government and international non-governmental organizations." This was simply a restatement of our long-held and continuing direct interest in international wildlife and its conservation. (Defenders By-Laws, Policy and Program Mission Statements are attached.)

8. Defenders of Wildlife has been actively involved in the negotiation and implementation of landmark international wildlife treaties such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention) (CCMA). Defenders has had official representatives at CITES and other international wildlife convention meetings, including the Bonn Convention.

• Defenders has in recent years retained Simon Lyster, author of *International Wildlife Law* (Grotius, Ltd., England, 1985) as counsel, magazine correspondent, and as one of our representatives at formal and informal meetings on international law and treaties such as those cited in the Endangered Species Act (Sections 2, 8, 8A, 15).

• Defenders has consistently supported and sought to strengthen the United States laws and programs protecting wildlife nationally and internationally, particularly the Endangered Species Act and programs authorized and duties required thereunder.

9. Defenders of Wildlife has actively worked for the conservation of foreign species through the U.S. Endangered Act. For example, Defenders has actively reviewed and submitted written comments on the proposed changes in the classification and/or regulations for listed foreign species such as the leopard and the kangaroo. Further, Defenders brought a lawsuit in 1981 challenging Department of the Interior regulations which repealed a 1974 import ban on the hides and meat of kangaroos threatened with extinction.

10. In further example, in 1985, the National Marine Fisheries Service (NMFS) listed the Gulf of California Harbor Porpoise as endangered in response to Defenders' 1978 petition. The Gulf of California harbor porpoise ex-

ists only in Mexican waters. Defenders has remained actively involved in the recovery process for the species by persuading Congress to provide funds for fiscal years 1986 and 87 through the Congressional appropriations process for NMFS to plan and conduct recovery efforts on behalf of the porpoise.

11. Defenders has sought to ensure funding to implement the Western Hemisphere Convention through the Congressional appropriations process as authorized in Section 8A(e) and Section 15(d) of the Endangered Species Act.

12. Defenders' staff attended both the negotiating convention held in Bonn, West Germany in 1979 and the first meeting of the parties held in Bonn in 1979 as approved official observers. Defenders played a leadership role in developing a coordinated, worldwide, non-governmental organization, position paper on the draft CCMA text which was distributed to all the governmental delegations assembled to negotiate the treaty.

13. Defenders' staff has attended and participated in four of the five regular biennial Conferences of the Parties to CITES as approved official observers. Defenders' unique expertise has often been solicited by governmental delegates at these meetings.

14. Defenders' representative served as a member of the U.S. delegation to the Special Working Group of the Parties to CITES in Geneva, Switzerland in 1977. Most recently, Defenders' representative attended the Technical Expert Committee meeting as an observer this year in Lausanne, Switzerland.

15. Defenders has long kept our members informed about and interested in international wildlife issues through publication of articles on wildlife overseas in numerous issues of *Defenders* magazine. A list of the ar-

ticles in wildlife in foreign countries and international waters from 1980 through 1986 is attached. (See also ESA Report, Saving Endangered Species, attached, Consultation Section, pp. 22-23.)

• In the early 1970's, then Defenders of Wildlife Board member Edward Steele launched a campaign to help solve Madagascar's ecological problems which threatened the island's endangered wildlife, particularly the many rare and endangered species of lemurs. In April 1975, *Defenders* magazine devoted an entire issue to Madagascar's wildlife (copy attached). The first article in the issue was entitled, "Madagascar's Endangered Wildlife". It mentions Dr. Robert Sussman, an anthropologist who is also a lemurologist at Washington University. Dr. Sussman, a Defenders member and recent Board member, has been a leader in the conservation of this wildlife and its habitat and has recently received an award from its government. Any U.S. activity there which encourages the further deforestation of the island is likely to affect these endangered species to the detriment of Dr. Sussman and other Defenders members.

• After the publication of "Dams" in *Defenders* May/June 86 issue, scores of Defenders members wrote the head of the World Bank protesting Bank funding of such multi-dam projects as the Narmada Valley Project now underway in India. It will include 30 major dams, 135 medium-sized dams and more than 3000 small dams over the next 50 years. The first phase alone will inundate 11% of the Narmada River basin's forests and with them much of the areas wildlife and its habitat. These include 35,000 acres of teak forest, traditionally harvested with the labor of asian elephants. ("Dams", Ibid., and *Bankrolling Disasters,* International Development Banks and the Global Environment, Sierra Club, 1986, copy attached.)

• Defenders of Wildlife and its members, e.g., – affidavits of Elliot McClure and Amy Skilbred, myself included, have been harmed, are being harmed and will be further harmed, in fact, by the detrimental effects of the U.S. agency actions supporting projects named and described in the Plaintiffs' complaint, supporting memoranda and affidavits, among others, on the species named and described in those documents, among others.

• Defenders' members include many who enjoy and study in Zoological Parks in the United States endangered and threatened wildlife from foreign countries, such as the asian elephant whose population will be diminished by A.I.D. and other agency actions in asia including Sri Lanka and Thailand as noted in the affidavits of Eliot McClure and Amy Skilbred. To the extent that these elephants and other species become less available for zoos in the U.S. due to their further endangerment overseas, these Defenders members will be harmed. Captive breeding efforts for many of the species, and thus their conservation, will also be harmed.

• There is a growing controversy over the lack of investigation, mitigation and conservation efforts undertaken by U.S. agencies concerning actions affecting endangered and threatened species and species which are likely to become so threatened and endangered in foreign countries.

• The question of whether consultation is required, as finally presented in the final regulation of the Secretary concerning the consultation process under Section 7 of the Act, is a specific and immediate example or a case in point of that controversy requiring resolution in order to avoid further harm as a result of the U.S. agency actions described in plaintiffs' submissions, among other U.S. actions.

• The relief the plaintiffs have requested, including the requirement in regulations of the Interior Department that agencies consult with Interior concerning the effects of their actions on threatened and endangered species in foreign countries, will prevent or reduce harm to the very interests the Endangered Species Act was designed to protect, including the interests of Defenders and its members.

• Defenders of Wildlife and its members will benefit from the reduction in harm and avoidance of jeopardy to and the opportunity for enhanced conservation and of the listed species that the requested consultation between agencies is intended to bring about.

/s/ Joyce M. Kelly
JOYCE M. KELLY

DISTRICT OF COLUMBIA, SS:

Subscribed and sworn to before me
this 6th day of November, 1986.

/s/ June M. Leartoan
Notary Public
My Commission Expires October 14, 1991

BY-LAWS OF DEFENDERS OF WILDLIFE as of May 3, 1986

ARTICLE I. NAME: BODY CORPORATE

The name of this Society shall be Defenders of Wildlife, with principal offices in Washington, D.C.

The persons who shall be the body politic and corporate, by name of Defenders of Wildlife, are and shall be the original incorporators as designated in the Certificate of Incorporation under the Laws of the District of Columbia and the persons who shall from time to time hold the office of Directors of this society.

ARTICLE II. PURPOSES

Defenders of Wildlife is a national, non-profit organization dedicated to preserving wildlife and promoting humane treatment of wildlife animals, emphasizing appreciation and protection for all species in their ecological role within the natural environment.

Through communication, education, and responsive action, Defenders of Wildlife endeavors to encourage improved public attitudes and policies for all living things.

ARTICLE III. ORGANIZATION AND MANAGEMENT

SECTION 1. BOARD OF DIRECTORS. The control and administration of the affairs and funds of the Society shall be by a Board of Directors of not more than twenty-four (24) persons, one-third of whom shall be elected each year in accordance with Section 3 of this Article. In addition to the foregoing, if at the end of his service as a Director by reason of Section 3(b) of this Article a person is Chairman (or immediate past Chairman) he shall, if he so desires, serve as a Director and as Immediate Past Chairman for a further term of one year.

SECTION 2. MEETINGS. The Board of Directors shall hold an Annual Meeting of the Society in April (or at such other time each year as may be determined by the Executive Committee after consultation with the President), and such other regular or special meetings of the Board as it may determine or as may be called by the Chairman or by any eight members of the Board, as such times and places as the notice may specify. At all such meetings eight members of the Board shall constitute a quorum. When a quorum is present at any meeting a majority of the Directors present shall decide any questions brought before the meeting, except as otherwide provided by law or by these By-Laws. Notice shall be given by the Chairman of the Secretary to each member of the Board at least five days prior to the holding of each such meeting.

SECTION 3. ELECTION OF DIRECTORS

(a) The Directors shall be elected prior to the Annual Meeting of the Society by the membership voting by written ballot. The persons elected will be those having the highest number of votes. Each Director shall hold office for a period of three years or until his successor is elected, and shall be eligible for re-election as hereinafter set forth.

(b) Effective at the 1974 Annual Meeting, any person who shall have served three consecutive full three-year terms shall be ineligible for re-election to the Board for a period of one year after the termination of the third consecutive term. In in any election more than three persons would be rendered ineligible by the preceding sentence, only those three with the longest service shall be ineligible.

(c) Any vacancy in the office of Director, Officer, or member of the Executive Committee may be filled for the unexpired term at any duly called meeting of the Board of Directors by vote of a majority of those Directors who vote. Service for an unexpired term under this paragraph shall not be counted against the periods relating to eli-

gibility for re-election specified in the preceding paragraph. Directors so elected shall take office immediately.

(d) Directors elected pursuant to paragraph 3(a) above shall take office at the end of the ensuing Annual Meeting.

SECTION 4. OFFICERS

(a) *Elective Officers.* The elective officers of the Society shall be a Chairman of the Board (Chairman), one or more Vice Chairmen, a Secretary, and a Treasurer, who shall be elected from the members of the Board of Directors at the Annual Meeting and shall serve for one year or until their successors are elected. Except as may be authorized by the Board for special services, all such officers shall serve without compensation, but they may be allowed their reasonable expenses in attending to the business of the Society, as the Board may determine.

(b) *Appointive Officers.* The appointive officers of the Society shall be a President, who shall be the Society's chief staff officer, and such other officers as the Board of Directors may from time to time determine. All officers to whom this paragraph applies shall be appointed by the Board at such times and on such terms as it shall establish, provided that the President, or any officer acting in his place, shall be entitled to attend and to speak at the meetings of the Board, the Executive Committee, and other committees, excepting executive sessions. No appointive officer, other than an Assistant Secretary and Assistant Treasurer, shall be a member of the Board of Directors during his term of office.

SECTION 5. EXECUTIVE COMMITTEE. The Executive Committee shall consist of the elected Officers, the Immediate Past Chairman, if any, as provided for by Section 1 of this Article, and not to exceed four other members of the Board elected from its number at the Annual Meeting. The Chairman of the Board shall serve as chairman of the Committee. The Executive Committee

shall possess and exercise all of the powers, authority and functions of the Board of Directors subject to review and ratification of the Board. During the intervals between the meetings of the Board of Directors, the Executive Committee shall supervise the affairs of the Society, act for and carry out the established policies of the Society as defined by the Board, and approve expenditures and commitments according to rules prescribed by the Board. The Executive Committee shall hold regular meetings as required for the business of the Society at such times and places as it may determine, and special meetings may be called at any time by the Chairman or any three members of the Committee. At least three days' notice of each meeting of the Executive Committee shall be given to its members, and at all such meetings a majority of the Committee shall constitute a quorum. The Executive Committee shall keep adequate minutes of all its meetings, which shall be circulated to all members of the Board of Directors.

SECTION 6. DUTIES OF THE OFFICERS. The elected Officers shall perform the usual functions and duties of such officials. The Chairman shall be the senior officer of the Society with general responsibility for its functioning, through the President, between meetings of the Board of Directors and Executive Committee; the Chairman (or in the absence of the Chairman, the senior Vice Chairman present) shall preside at all meetings of the Board and Executive Committee. The Secretary shall record the activities of the Board of Directors and the Executive Committee. The Treasurer shall have the care and custody of the funds of the Society and shall render an Annual Report to the Board of Directors for the calendar year ending December 31st of each year. Such reports are to be audited at such times and in such manner as the Board may direct.

SECTION 7. COMMITTEES.

(a) *Finance Committee.* There shall be a Finance Committee consisting of the Chairman of the Board, the Treasurer (who shall serve as chairman) and not more than three other persons elected by the Board from its membership. The Finance Committee shall have responsibility for supervising the disbursements and investments of the funds the Society, subject to the Annual Budget and overall policy guidance and instructions from the Board. The Committee shall make a report on the finances and investments of the society at each meeting of the Board of Directors.

(b) The Board of Directors or the Executive Committee may create such other Committee as either may deem necessary for the accomplishments of the objectives of the Society. Members of such Committees shall be appointed by the Chairman subject to approval by the Board or the Executive Committee, as the case may be. Members of the Society, Directors, and Officers shall be eligible for membership on all Committees so created. Decisions made by all such Committees shall be subject to approval of the Board or the Executive Committee unless the resolution creating the Committee specifies otherwise.

SECTION 8. NOMINATIONS and ELECTIONS

(a) *Election of Nominating Committee*—At the Annual Meeting, a Nominating Committee of five (5) members shall be elected by the Board of Directors.

(b) *Nomination and Election of Directors*

(i) Prior to October 1 of each year, notice shall be given to the membership, by publication in the Magazine, or by other means reasonably calculated to inform the members, that proposals of individuals to serve on the Board of Directors may be sent to the Nominating Committee at Defenders' Headquarters. The notice shall set a

deadline for the receipt of said proposals. All proposals shall be accompanied by a brief statement of the candidate's qualifications.

(ii) Not later than December 1, the Nominating Committee shall submit a list of nominees to the Board of Directors. Within thirty (30) days thereafter, any Director, with the written concurrence of seven (7) other Directors, may nominate any person whose name and qualifications were submitted to the Nominating Committee prior to the deadline date and was not included on the list of nominees, provided that person has consented in writing to his nomination. Each person so nominated shall be added to the list of nominees.

(iii) The final list of nominees, accompanied by a statement of their qualifications, a ballot form and a return envelope, shall be mailed to the members of the Society at least sixty (60) days prior to the Annual Meeting.

(iv) All ballots shall be tabulated not less than fifteen (15) days prior to the Annual Meeting. The ballots shall be counted by tellers appointed by the Chairman, or if appropriate, by a disinterested person or agency designated by the Chairman. The results shall be announced at the Meeting and in the first issue of the Magazine published thereafter.

(c) *Nomination and Election of Elective Officers*

(i) The Nominating Committee shall also make nominations for officers to be elected by the Board of Directors. The Committee's nominees and any election rules proposed by the Chairman shall be transmitted with the Notice of Annual Meeting to all members of the Board of Directors not less than thirty (30) days prior to the Annual Meeting.

(ii) The results of the election of officers shall be announced in the issue of the Magazine which reports the election of Directors.

SECTION 9. PUBLICATIONS. The Board of Directors may provide for periodicals or any other publications necessary and proper for promoting and carrying out the objects of the Society.

SECTION 10. FISCAL YEAR. The Fiscal year of the Society shall be the calendar year.

ARTICLE IV. MEMBERSHIP

Membership in the Society shall be in such classes and with such respective contributions, benefits and privileges, as the Board of Directors may from time to time determine by formal resolution.

ARTICLE V. LOCAL CHAPTERS

SECTION 1. Local chapters to assist and promote the objects of the Society may be organized, but they shall not be permitted to use the name of the Society until they have been issued a charter by direction of the Board of Directors or the Executive Committee, and signed by or on behalf of the Chairman. Upon issuance of such a charter, the chapter may use the Society's name with an appropriate identifying clause, such as "Defenders of Wildlife, _____ Chapter," and shall in all respects comply with the terms of the charter.

SECTION 2. If and when any such chapter is to be organized, the proposed By-Laws must first be submitted for approval by the National Society's Board of Directors or Executive Committee. These By-Laws shall make appropriate reference to the articles of incorporation of the

National Society, Defenders of Wildlife, and shall state objects of the chapter that are substantially the same as the objects of this Society.

SECTION 3. It shall be the duty of the local chapters to develop local programs consistent with, and to assist and promote, the objectives of the National Society.

SECTION 4. The Society stands willing, and expects, to cooperate with other organizations with similar objectives. However, no unit of the Society, whether national or local, shall enter into official affiliation with any other organization in such manner as to subordinate the Society or to commit it to policies or activities determined by others.

SECTION 5. The charter of any local chapter may be suspended or revoked, but only for cause, by a three-fourths vote of the Board of Directors or Executive Committee. No such action shall be taken without at least thirty days' notice and an opportunity to be heard. Such notice shall set forth the charges and be sent in writing to the chief officer of the chapter, who shall, upon request, be granted a hearing before the Board of Directors or Executive Committee, as the case may be.

ARTICLE VI. PARLIAMENTARY AUTHORITY

The rules contained in the current edition of Robert's Rules of Order Newly Revised shall govern the Society in all cases to which they are applicable and where they are not inconsistent with these By-Laws and any special Rules of Order the Society may adopt.

ARTICLE VII. AMENDMENTS

These By-Laws may be amended by a two-thirds vote of the members of the Board of Directors present and voting

at any meeting of the Board. Not less than 20 days' notice of each proposed amendment shall be given to the Board in writing through the Chairman of the Board.

# # #

DEFENDERS OF WILDLIFE

May 1984

General Policy Statement

Overall Policy

The goal of Defenders of Wildlife is to preserve, enhance, and protect the natural abundance and diversity of wildlife including the integrity of natural wildlife ecosystems. Defenders recognizes the intrinsic value of wildlife, the importance of its humane treatment and the many benefits of wildlife to society. Defenders seeks to achieve its goals through education and reasoned advocacy of appropriate public policies.

Basic Concerns

The earth's wild flora and fauna are increasingly threatened by environmental degradation, species extinction, and the destruction of natural habitat and wildlife itself. Defenders of Wildlife is dedicated to reversing these trends. To protect indigenous wildlife and its natural habitat, Defenders will address such issues as:

1) The decline and consequent threat of extinction of individual species;
2) The artificial manipulation of species abundance by consumptive interests;
3) The regional loss of species once present;
4) Environmental degradation
5) Inhumane treatment of wildlife.

Strategies

To achieve these goals and to address these concerns, Defenders will:

1) Monitor federal and state wildlife policies and take appropriate action to achieve sound policies and decisions in administrative, legislative and judicial forums;
2) Educate and build an effective, informed constituency dedicated to influencing public policy and practices on matters affecting wildlife;
3) Assemble, analyze, and disseminate scientific data and policy information on wildlife issues;
4) Raise public awareness of wildlife issues through the media, Defenders magazine, educational materials, public appearances and other activities;
5) Cooperate with other organizations and individuals who share Defenders' objectives on any wildlife issues;
6) Address international issues primarily through avenues of influence provided by domestic government and international non-governmental organizations.

Adopted by the Board of Directors
on April 30, 1983

DEFENDERS OF WILDLIFE

May 1984

Program Mission Statements

Endangered Wildlife

Defenders seeks to preserve the natural diversity of wild fauna and flora threatened by an accelerated rate of population decline or extinction. The program seeks to prevent extinction of depleted, threatened and endangered species by ensuring that domestic and international law and its implementation protects these species and their critical habitats, and promote species recovery.

Wildlife on Public Land

Defenders seeks to protect and enhance the integrity of natural wildlife ecosystems on the publicly owned lands in the United States as a public trust. To this end, Defenders promotes protective designations, acquisitions and public land use policies which provide maximum benefits for wildlife and its habitat.

Wildlife Management

Defenders seeks to promote ecosystem management designed to preserve and enhance natural abundance and diversity, and to improve traditional management philosophies to benefit all wildlife. Defenders seeks to increase public awareness of wildlife management issues and to promote citizen participation in wildlife management decisions.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-757

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, AND THE HUMANE SOCIETY OF THE UNITED STATES, PLAINTIFFS

vs.

DONALD P. HODEL, AS SECRETARY OF THE INTERIOR, DEFENDANT

AFFIDAVIT OF H. ELLIOTT McCLURE

State of California)
) ss.
County of Ventura)

H. Elliott McClure, being duly sworn, states:

1. I am a member of Defenders of Wildlife and have been a member since the early 1950's. Since 1978 I have been a member of the Board of Directors and am currently Chairman of the Tropical Wildlife-International Committee of Defenders' Board of Directors.

2. I make this affidavit of my own knowledge and, if called upon to testify, could testify to the matters herein.

PERSONAL INTERESTS

3. I am a biologist and have authored over 125 publications, (*curriculum vitae* and partial list of publications

attached) with a heavy emphasis on wildlife conservation in Japan and Southeast Asia where I lived from July 1950 to July 1975 and where I did study and enjoy, and continue to study and enjoy endangered asian elephants, tigers, Rhinos, helmeted hornbills, and other endangered wildlife, and their habitat as often as possible.

4. I served as ecologist for the Walter Reed Army Institute of Research in Japan for 11 years, in Thailand for 9 years, and in Malaya for 5 years.

5. I have visited, studied, and taken a continuing personal and professional interest in endangered wildlife such as tigers, asian elephants, Sumatran rhinos, helmeted hornbills and their habitat in Thailand and Malaysia.

6. I wrote an article which was published in *Defenders* Dec 82/Jan 83 issue entitled, "Malaysian Reserves in Danger" (p. 34 copy attached). In the same issue was another article entitled "Goodbye Malaysia's Wildlife?", (p. 29*ff* copy attached).

7. Since I left S.E. Asia, I have returned to study and enjoy these species and their habitat. I plan to return to Thailand and Malaysia to continue my enjoyment of and research on wildlife. I am also sponsoring continued research on endangered helmeted hornbills and other hornbills in Thailand. Furthermore, I serve on the Hornbill Working Group of the International Committee for the Protection of Birds, perhaps the oldest international wildlife conservation group in the world.

8. United States aid and funding for dams and development in both of these countries have harmed, are harming, and continue to pose a risk of harm to the endangered wildlife I study and enjoy (including but not limited the species noted above) and its habitat. These include the endangered asian tapir and the largest population of Asian elephants in Thailand which will be destroyed if the Nam Choan Dam, which is to be funded with U.S. funds

through the World Bank, is built as proposed on the Kwae Yai River. (See attached article, "Dams" by Goldsmith and Hildyard, 19-32, at 29, *Defenders* May/June 86.)

• The Bureau of Reclamation, in its publication (p. 4, copy attached) "Water for the World", notes that among the projects its has aided in more than 115 nations, it has planned and proposed a project for a dam the size of the Grand Coulee on the Lower Mekong River Basin in Thailand and Laos with a reservoir that could irrigate 4.9 million acres. This will harm endangered wildlife including but not limited to the asian elephant and tiger, and thus harm me, personally and professionally.

9. United States funds and Treasury Department approval of World Bank loans have made possible the destruction of portions of 100 species of mammals and 300 species of birds, most already near extinction, such as the Sumatran rhinoceros, the Asian tapir and elephant (all endangered) by the building of the Temenggor Dam in North Perak, Malaysia. (Dams, at 30.)

10. The Taman Nagara National Park and its endangered rhinos, tigers, and tapirs in northern Malaysia have been threatened with partial inundation by a dam on the Tembeling River that would have been funded by the World Bank. The plans have been halted for now as far as I know. (*Id.*) I have enjoyed and studied this park and its wildlife. I guided a tour of 25 people through the park in 1983. I hope to do so again in the future.

11. The destruction of endangered wildlife in these and other areas harms me personally and professionally by depriving me of the subjects of my enjoyment, of the subjects of the research, publication and other elements of my career, and of a significant part of the environment that sustains healthful life, including my own.

12. Requiring consultation between the Secretary of the Treasury and others and the Secretary of the Interior

under the Endangered Species Act would help avoid harming and jeopardizing the endangered wildlife now threatened by the projects described in this affidavit and other U.S. agency actions. Therefore such consultation would prevent personal and professional harm to me.

DEFENDERS' INTEREST

13. To achieve Defenders of Wildlife's chief goal "to preserve, enhance and protect the natural abundance and diversity of wildlife including the integrity of natural wildlife ecosystems", Defenders' Board of Directors on April 30, 1983 adopted a general policy statement which included the strategy of addressing "international issues primarily through the avenues of influence provided by domestic government and international non-governmental organizations." This was simply a restatement of our long-held and continuing direct interest in international wildlife and its conservation. (Defenders By-Laws, Policy and Program Mission Statements are attached.)

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• Defenders has in recent years retained Simon Lyster, author of *International Wildlife Law* (Grotius, Ltd., England, 1985) as counsel, magazine correspondent, and as one of our representatives at formal and informal meetings on international law and treaties such as those cited in the Endangered Species Act (Sections 2, 8, 8A, 15).

• Defenders has consistently supported and sought to strengthen the United States laws and programs protecting wildlife nationally and internationally, particularly the Endangered Species Act and programs authorized and duties required thereunder.

15. Defenders of Wildlife has actively worked for the conservation of foreign species through the U.S. Endangered Act. For example, Defenders has actively reviewed and submitted written comments on the proposed changes in the classification and/or regulations for listed foreign species such as the leopard and the kangaroo. Further, Defenders brought a lawsuit in 1981 challenging Department of the Interior regulations which repealed a 1974 import ban on the hides and meat of kangaroos threatened with extinction.

16. In further example, in 1985, the National Marine Fisheries Service (NMFS) listed the Gulf of California Harbor Porpoise as endangered in response to Defenders' 1978 petition. The Gulf of California harbor porpoise exists only in Mexican waters. Defenders has remained actively involved in the recovery process for the species by persuading Congress to provide funds for fiscal years 1986 and 87 through the Congressional appropriations process for NMFS to plan and conduct recovery efforts on behalf of the porpoise.

17. Defenders has sought to ensure funding to implement the Western Hemisphere Convention through the Congressional appropriations process as authorized in Section 8A(e) and Section 15(d) of the Endangered Species Act.

18. Defenders' staff attended both the negotiating convention held in Bonn, West Germany in 1979 and the first meeting of the parties held in Bonn in 1979 as approved official observers. Defenders played a leadership

role in developing a coordinated, worldwide, non-governmental organization, position paper on the draft CCMA text which was distributed to all the governmental delegations assembled to negotiate the treaty.

19. Defenders' staff has attended and participated in four of the five regular biennial Conferences of the Parties to CITES as approved official observers. Defenders' unique expertise has often been solicited by governmental delegates at these meetings.

20. Defenders' representative served as a member of the U.S. delegation to the Special Working Group of the Parties to CITES in Geneva, Switzerland in 1977. Most recently, Defenders' representative attended the Technical Expert Committee meeting as an observer this year in Lausanne, Switzerland.

21. Defenders has long kept our members informed about and interested in international wildlife issues through publication of articles on wildlife overseas in numerous issues of *Defenders* magazine. A list of the articles in wildlife in foreign countries and international waters from 1980 through 1986 is attached.

• In the early 1970's, then Defenders of Wildlife Board member Edward Steele launched a campaign to help solve Madagascar's ecological problems which threatened the island's endangered wildlife, particularly the many rare and endangered species of lemurs. In April, 1975, *Defenders* magazine devoted an entire issue to Madagascar's wildlife (copy attached). The first article in the issue was entitled, "Madagascar's Endangered Wildlife". It mentions Dr. Robert Sussman, an anthropologist who is also a lemurologist at Washington University. Dr. Sussman, a Defenders member and recent Board member, has been a leader in the conservation of this wildlife and its habitat and has recently received an award from its government.

Any U.S. activity there which encourages the further deforestation of the island is likely to affect these endangered species to the detriment of Dr. Sussman and other Defenders members.

• After the publication of "Dams" in *Defenders* May/June 86 issue, scores of Defenders members wrote the head of the World Bank protesting Bank funding of such multi-dam projects as the Narmada Valley Project now underway in India. It will include 30 major dams, 135 medium-sized dams and more than 3000 small dams over the next 50 years. The first phase alone will inundate 11% of the Narmada River basin's forests and with them much of the areas wildlife and its habitats. These include 35,000 acres of teak forest, traditionally harvested with the labor of Asian elephants. ("Dams", Ibid., and *Bankrolling Disasters*, International Development Banks and the Global Environment, Sierra Club, 1986, copy attached.)

• Defenders of Wildlife and its members, including me, have been harmed, are being harmed and will be further harmed by the detrimental effects of the projects named and described in this statement, among others, on the species named and described in this statement, among others.

• Defenders of Wildlife and its members will benefit from the reduction in harm and avoidance of jeopardy to the listed species that the requested consultation between agencies is intended to bring about.

/s/ H. Elliott McClure
H. ELLIOTT MCCLURE

Subscribed and sworn to before me
this 5th day of November, 1986.

/s/ Linda Krebs
Notary Public
[SEAL]
My Commission Expires Jan. 31, 1989

Further statement by Dr. McClure:

I have consulted with my colleague Dr. Ardith Eudey, of Upland, Calif., who has recently returned from Thailand. For the past fifteen years she has been conducting studies of primates at Huey Khakeng a wildlife refuge adjacent to the area that will be inundated by the Nam Choan Dam on the Kwai Yai River. She found during her visit there early this year that the dam was already under construction with access roads, etc. The Thai government is committed to this hydro-electric dam and would probably seek money for its completion from Japan or Germany if it is not available from the World Bank.

No adequate environmental impact survey of the effects of the dam and its accompanying impoundment were ever made. Biologists in the region including myself and Dr. Eudey are concerned because the flooded areas will disrupt the migration routes of Asian elephants that move annually from Thailand into Burma. It will also flood important lowland forest in the Thung Yai wildlife refuge adjacent to it. Other rivers in the region may also be under consideration for hydroelectric dams.

The history of the public attitude in Thailand toward areas devoted to the preservation of ecosystems and wildlife has been that such actions are infringements on their rights to harvest both trees and animals. Because of this, opening the forest for the construction of dams or highways brings about the immediate destruction of trees and animals by uncontrolled poaching.

The penetration of these forests by commercial and government projects is of great concern to me and other American and European biologists whose work is interrupted and damaged by such efforts, as well as the continued loss of plants and animals of world-wide interest.

Curriculum Vitae

DR. H(OWE) ELLIOTT McCLURE

Address: 69 E. Loop Drive, Camarillo, Calif. 93010

Home Phone: (805) 482-0411

Born: Chicago, Ill., 29 April, 1910

Married: 1 Oct. 1933, Lucy Esther Lou Fairchild (Born 4 Aug. 1910, Danville, Ill.)

Children: Lucy Jeannette, 12 Jan. 1941; Clara Ann, 1 June 1942.

Education:

B.S., University of Illinois, 1933, major, Entomology, minor, Zoology.

Phi Beta Kappa, Sigma Xi, Phi Etta Sigma, High Honors Grad.

M.S., Uni. of Ill., 1936, major, Entomology, minor, Animal Ecology.

Ph.D. Iowa State College, 1941, major, Wildlife Conservation

Employment:

Asst. Entomologist; Illinois State Natural History Survey, 1930-33.

Research; Tree Expert, Illinois Tree Service Co., 1934-35, 1936-37.

Grad. Asst.; Iowa State Col., 1937-41, Iowa Coop. Wildlife Unit, 1938-41 (Mourning Doves).

Biologist and Wildlife Technician; Game Forestation and Parks Comm., Nebraska, 1941-44, Upland gamebird research.

Hospital Corps; U.S.N.R. 1942-45, Entomologist.

Biologist; U.S Public Health Service and the Hooper Medical Foundation, Uni. of Calif., 1946-50, Medical ornithological research. (at Bakersfield, Calif.)

Ornithologist; Univ. of Pittsburgh, 1950, Research in Japan.

Medical Ornithologist; 406th Medical General Lab., 1951-58, Research related to arthropod borne viruses in Japan.

Ecologist; U.S. Army Medical Res. Unit, Institute of Medical Research, Kuala Lumpur, Malaysia, 1958-63, Bionomics of Malayan birds.

Ornithologist and director; Migratory Animal Pathological Survey, Walter Reed Army Institute of Research. 1963-1975 (Bird Migration in Eastern Asia) 1963-66, Attached to U.S. Air Force in Japan, 1966-73, in cooperation with the Applied Scientific Research Corporation of Thailand, Bangkok. 1973-75, U.S. Army Medical Component, S.E.A.T.O., Bangkok, Thailand, Advisor to the Commanding Officer.

Retired: 30 June 1975.

Societies: Wilson Ornithological Club, Cooper Ornithological Club, American Ornithological Union, Wildlife Society, Ecological Society of America, America Entomological Society, New York Zoological Society, California Academy of Science, North-Eastern Bird-banding Assoc., Eastern Bird-banding Assoc., Inland Bird-banding Assoc., Western Bird-banding Assoc., (President 1948-50), Malayan Nature Society (Chairman, Selangor Branch 1960-62, President 1962-1963), National Geographic Society, National Parks Association, Defenders of Wildlife, Siam Society, Explorers Club.

Etcetera: President, Western Bird-banding Assoc., 1948-50; Chairman, Selangor Chapter, Malayan Nature Soc. 1960-62; Pres., Malayan Nature Soc. 1962-63; Pres., Friends of Khao Yai National Park, Thailand, 1972-73; Asst. Ed., Siam Soc. Natural History Bull. 1970-75; Board Member, Defenders of Wildlife 1978- Boy Scout leader for 25 years at Danville, Ill., Lewis, Iowa, Ord, Nebr., Vallejo, Calif., Tokyo, Japan. Received Silver Beaver in 1958. 125 publication in Entom., Ornith., Ecol., Wildl. Mangt., Mamm., Bot., etc.

DR. H(OWE) ELLIOTT McCLURE

Publications

1959 Ecologic studies of Japanese encephalitis virus in Japan. IV. Avian infection. Am. Jour. Trop. Med. & Hyg., 8: 678-688. (E.L. Buescher, W.F. Scherer, H.E. McClure, J.T. Moyer, M.Z. Rosenberg, M. Yoshii and Y. Okada).

1959 Ecological studies of Japanese encephalitis virus in Japan. V. Avian factors. Am. Jour. Trop. Med. & Hyg., 8: 689-697 (W.F. Scherer, E.L. Buescher and H.E. McClure).

1960 Report concerning the 12th conference of the International Council for bird protection, Malayan Nature Jour. 10: 204-213.

1960 Ringer's Progress or: Birding on a bamboo raft. Pacific Discovery, 13: 21-26.

1961 Some birds of the Mae Ping River in Northern Thailand, Natl. Hist. Bull. Of the Siam Soc. 20: 1-8. (H.E. McClure and Boonsong Lekagul).

1961 Carden birds in Kuala Lumpur, Malayan Nature Jour., 15: 111-133.

1961 Batu Caves, Kuala Lumpur. Nature Conservation in Western Malaysia, pp. 73-78.

1961 Bird ringing in Asia. Nature Conservation in Western Malaysia. pp. 178-182.

1962 Ten years and 10,000 birds. Bird-Banding, 33: 1-21, 33: 69-84.

1962 Epidemiology of the arthropod-borne viral encephalitides in Kern County, California, Univ. of Calif. Public. in Public Health 4: 109-154. (W.C. Reeves, W. McD. Hammon, W.A. Longshore, H.E. McClure, and A.F. Geib).

1962 Bird ringing in Malaya. The Ring. 30-31: 95-97.

1962 What can I expect to see? Malayan Nature Journal, 16: 70-72.

1963 English vernacular names of the birds of the Malaysian Subregion. Malayan Nature Jour., 17: 75-121.
1963 Birds and the epidemiology of Japanese Encephalitis. Proceed XIIIth Intern. Ornith. Cong. 1963, pp. 604-610.
1963 Some bird "rarities". Malay. Nat. Jr. 17: 173-178.
1963 Northern visitors to Malaya. Malay. Nat. Jr. 17: 232-234.
1963 Bird Report: 1962. Malay. Nat. Jr. 17: 123-144. (Lord Medway, D.R. Wells, FGH Allen, C.A. Keel, H.E. McClure, J.B. Mitchell, K.W. Scriven, G.A. Watson, M.A. Webster).
1963 Is this one of the rarest birds in the World? Malay. Nat. Jr. 17: 184-187.
1963 A wounded tapir. Malay. Nat. Jr. 17: 266-268.
1964 Some observations of primates in climax Dipterocarp forest near Kuala Lumpur, Malaya. Primates, 5: 39-58.
1964 Avian bionomics in Malaya: 1. the avifauna above 5000 ft. altitude at Mound Brinchang, Pahang. Bird-Banding, 35: 141-183.
1964 A thrush rediscovered. Animals 4: 40.
1964 An Asian bird-banders Manual. Migratory Animal Pathological Survey.
1964 Host distribution of nasal mites (Acarina) of birds in Malaysia. Federation Museum Jr. IX: 102-114 (M. Nadchatram, H.E. McClure, Lim Kee Chong).
1965 Comparison of the periods of residency of some migrant birds common to Japan and Malaya. Misc. Reports Yamashina's Institute for Ornith. and Zool. 4: 149-162, No. 3 and 4.
1965 Microcosms of Batu Caves. Malayan Nat. Jr. 19: 65-74.
1965 Avian bionomics of Malaya 2. The effect of forest destruction upon a local population. Bird Banding 36: 242-269 (H.E. McClure and Hussein bin Othman).

1966 Some observations of vertebrate fauna of the Nebraska Sandhills, 1941 through 1943. Nebr. Bird. Review. 34: 2-15.
1966 Tale of two tall feathers. Animals, 8: 370-372.
1966 An International study of birds in Asia. Malayan Forester, pp. 45-47.
1966 Death on the highway. Malay. Nat. Jr. 19-305-7.
1966 An Asian bird-banders manual. Migratory Animal Pathological Survey (revised).
1966 Flowering, fruiting and Animals in the canopy of a tropical rain forest. Malayan Forester. XXIX: 182-203.
1966 Ecological aspects of the blood parasitology of Malayan birds. Proceed. First Intern. Congress Parasitology, 1964, 1: 235-236. (M. Laird and H.E. McClure).
1967 The composition of mixed species flocks in lowland and sub-montana forests of Malaya. Wilson Bul. 79: 131-154.
1967 Fauna of the Dark Cave, Batu Caves, Kuala Lúmpur, Malayasia. Pacific Insects, 9: 399-428 (H.E. McClure, Lim Boo-Biat, and Sarah E. Winn).
1968 Nesting birds is a coconut-mangrove habitat in Selangor. Malayan Nat. Jr. 22: 18-28 (H.E. McClure and Husain bin Haji Osman)
1969 Thirty years of banding birds. Western Bird-Bander, 44: 3-4.
1970 Three notes on Thai birds. Natural History Bul. Siam Soc. 23: 331-343.
1970 In contemplation of the global wildlife conservationist. Proc. IUCN Eleventh Technical Meeting, New Delhi, 1969, p. 125-136.
1971 The sale of birds at the Bangkok "Sunday Market", Thailand. Natural Hist. Bul. Siam Soc. 24: 41-78. (H.E. McClure and Somtob Chaiyapun)

Annual Reports, Migratory Animal Pathological Survey, (as follows)

1964 Mimeographed, July 1965, 151 pp.

1965 Applied Scientific Research Corporation of Thailand Bangkok, July, 1966, 87 pp.

1966 Applied Scientific Research Corporation of Thailand Bangkok, July 1967, 298 pp.

1967 Applied Scientific Research Corporation of Thailand Bangkok, Sept. 1968, 205 pp.

1968 Applied Scientific Corporation of Thailand, Bangkok, July 1969, 340 pp.

1969 Applied Scientific Res. Corp. Thailand, Bangkok, Sep. 1970, 130 pp.

1970 Applied Scientific Res. Corp. Thailand, Bangkok, July 1971, 18 pp.

1972 Birds banded in Asia during the MAPS program, by locality from 1963 through 1971. 478 pp. (McClure, H.E. and Leelavit, B.)

1973 The avifaunal complex of an Open-billed Stork colony (*Anastomus oscitans*) in Thailand. Natural History Bulletin of the Siam Society. 25: 133-155. (McClure, H.H. and Kwanyuen, P.)

1973 Some ectoparasites of the birds of Asia. Migratory Animal Pathological Survey, ASRCT, Bangkok, 219 pp. (McClure, H.E. and Ratanaworabhan, N.)

1973 Some aspects of bird migration in Asia. Nature Conservation in the Pacific, Australian National University Press. p. 149-164.

1974 Migration and survival of the birds of Asia. SEATO Med. Res. Lab. Publication. 480 pp.

1974 Some bionics of the birds of Khao Yai National Park, Thailand. Nat. Hist. Bull. Siam Society. 25:99-194.

1975 The subgenus *Persicargas* (Ixodoidea; Argasidae; *Argas*). 20. *A.(P). robertsi* parasitizing nesting wading birds and domestic chickens in the Australian and Oriental regions, viral infections, and host migration. J. Med. Ent. 11:513-524. (Hoogstraal, H., Kaiser, M.N., McClure, H.E.)
1976 The human side of bird banding. North American Bird Banding. 1:120-126.
1976 Two tropical forests and their birds. Journal of the Bombay Natural History Society 71: 517-535.
1977 The secret life of a tree. Animal Kingdom. 80: 16-23, No. 8.
1977 Twenty-five years of bird watching at Mt. Takao near Tokyo, Japan. Tori. 26:13-19.
1978 Kingfishers, the gems of forests, ponds and stream. Zoonooz 51: 4-8, No. 4.
1978 Incandescent roosts of swallows. Pacific Discovery. 31:12-13, No. 1.
1978 Some arthropods of the dipterocarp forest canopy in Malaya. Malayan Nature Journal. 32:31-51.
1978 Bats over Bangkok. Natural History Bulletin-Siam Society. 27: 133-168.
1978 with Pilai Poonswad, Ellis C. Greiner and Marshall Laird. Haematozoa in the birds of eastern and southern Asia. Memorial University of Newfoundland, St. Johns, Newfoundland. 296 pp.
1979 The miracle of movement. Hemisphere. 23: 44-54, No. 1.
1979 Nesting of the White-whiskered Tree Swift in Malaya. Condor. 81: 308-311.
1979 The Ring and I. The Ring. No. 100.
1980 Hornbills, forest clowns. Hemisphere. 24: 32-39, No. 1.
1980 Food webs in a tropical cave. Hemisphere. 24: 144-151, No. 3.
1981 The singers are heard. Hemisphere. 26: 8-10, No. 1.

1982 Birds of the Kanto Plain—A generation ago. Jr. Yamashina Inst. Ornith. 14: 187-205.

1981 Some responses of resident animals to the effects of fire in a coastal chaparral environment in Southern California. Cal-Neva Wildlife 1981; 86-99.

1984 The wilted forest. Hemisphere 28: 76-82, No. 2. also Hemisphere Annual V: 76-82.

1984 Survival among the birds of eastern and south-east Asia. Journal of the Yamashna Institute of Ornithology. In Press.

1984 The occurrence of hippoboscid flies on some species of birds in Southern California. Journal of Field Ornithology. 55: 230-240.

1984 Some visual effects from the drouth of 1983 on the birds of South-east Asia. Malayan Nature Journal. In press.

1984 Bird Banding—An Introduction. 350 pp. The Boxwood Press, Pacific Grove, Calif.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-757

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, AND THE HUMANE SOCIETY OF THE UNITED STATES, PLAINTIFFS,

VS.

DONALD P. HODEL, AS SECRETARY OF THE INTERIOR, DEFENDANT

AFFIDAVIT OF MAXINE E. McCLOSKEY

District of Columbia) ss.

Maxine E. McCloskey, being duly sworn, states:

1. I am a member of Defenders of Wildlife and its Board of Directors and serve on the Tropical Forests International Committee of Defenders' Board of Directors.

2. I make this affidavit of my own knowledge and, if called to testify, could testify to the matters herein.

3. When I was an instructor in U.S. history and political science at Merritt College, Oakland, California, I learned of the opportunity presented by the Annual National Convention of the American Association for the Advancement of Science to arrange a symposium on en-

dangered species. The convention was held in San Francisco, California in February 1974. The symposium was titled: Symposium on Endangered Species: Causation and Remedies. It featured twenty-four speakers and was held for two days.

4. Because of my interest in endangered species, I was approached by the founder of Project Jonah (a wildlife conservation project) to become a member of its board of directors. I served on the board from 1973-1977, serving as president during 1977.

5. I founded the Whale Center in January, 1978 in Oakland, California, and served as its first president through 1985 and executive director (a paid professional position) through 1984. With this specialized concentration in whales (nine species of great whales are on the U.S. endangered species list and all ten are protected from trade by CITES) I participated in the annual meetings of the International Whaling Commission from 1977 through 1985. For seven of those meetings I served as appointed adviser to the U.S. Commissioner to the whaling commission. I have written extensively on whale conservation matters and have taught courses on conservation policy.

6. In pursuit of my interest in wildlife conservation, I attended three General Assemblies of the International Union for the Conservation of Nature (IUCN). The assemblies were held in Geneva, Switzerland, Christchurch, New Zealand, and Madrid, Spain. During the assembly in Madrid, I was observer for Defenders of Wildlife. I was also invited to prepare a forty-page paper on whale sanctuaries for the Third World Congress on National Parks, sponsored by the IUCN, held in Bali, Indonesia, October, 1982.

7. In 1981 I participated in the Meeting of the Parties of the Convention on International Trade in Endangered Species, held in San Jose, Costa Rica.

8. In 1985 I represented Defenders of Wildlife at the First Meeting of the Parties to the Convention on Migratory Species, held in Bonn, Germany.

9. Some of my travels have included areas of special concern for the welfare and survival of a variety of endangered species. These include visits to Bali, Indonesia in 1982, and to Brazil in 1984. One of my purposes on these trips was to enjoy and study the wildlife or its presence in the areas to the extent possible. I plan to continue my trips to enjoy and study endangered wildlife in foreign countries and their territorial waters.

10. During the trip to Bali I learned about the ongoing U.S.-funded translocation projects that remove vast numbers of the population from the highly conjested islands of Java to outer islands including Irian Jaya. This population removal and transmigration jeopardizes such endangered species as the orangutan and the Sumatran rhinocerous. I also learned more about subsistence hunting of endangered fin whales in Indonesian waters. On visits to various national parks on Bali, I learned about some of the conservation problems of endangered species there and enjoyed seeing their habitat.

11. When in the border area that divides Brazil, Argentina, and Paraguay, I saw the unbelievable Iguazu Falls and Park and learned about the endangered species in the region. I also saw the Itaipu Dam, the largest hydroelectric project in the world, saw the enormous lake that it created, and the effect on the habitat and learned about the endangered and nonendangered species impacted by this massive development. The endangered species whose habitat was flooded by this project include the margay, harpy eagle, jaguar, maned wolf, and howler monkey. (*Defenders* September/October 1983 Issue included the attached) article "Rescue on the Parana" about the effort to collect as many of the animals fleeing the 100-mile flood as possible.)

12. I plan to return to these sites to study and enjoy the endangered species and their habitat there.

13. I will be harmed, in fact, both personally and professionally, and Defenders and its members will be harmed if the habitat of these endangered wildlife, and hence the wildlife themselves, is further degraded or diminished as it is threatened to be by U.S. on-going agency actions and funding for deforestation in the tropical rainforests of Brazil through such projects as the Polonoroeste project. (See Aufderheide and Rich, "Debacle in the Amazon", *Defenders* March/April 1985, p. 20*ff*. attached). We and these species will also be harmed directly by the series of approximately 32 dams in the Amazon River basin being funded by U.S. funds through the World Bank according to the article "World Bank Dam Loans to Spur Amazon Hydro-Development", in *International Dams Newsletter*, September, 1986 (copy attached).

14. Requiring consultation, as Defenders is seeking, between action agencies and the Department of the Interior's Fish and Wildlife Service would help prevent harm to these endangered species and, hence, to me.

/s/ Maxine E. McCloskey
MAXINE E. McCLOSKEY

Subscribed and sworn to before me
this 4th day of November, 1986.

/s/ Roselyn E. Vaccaro
Notary Public
[SEAL]
My Commission Expires Feb. 14, 1990

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-757

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, AND THE HUMANE SOCIETY OF THE UNITED STATES, PLAINTIFFS

vs.

DONALD P. HODEL, AS SECRETARY OF THE INTERIOR, DEFENDANT

AFFIDAVIT OF J. CAMPBELL PLOWDEN

District of Columbia) ss.

J. Campbell Plowden, being duly sworn, states:

1. I have been a staff member of The Humane Society of the United States (HSUS) since January, 1985.

2. I received a B.A. in biology with an emphasis on ecology and environmental studies from the University of Pennsylvania in 1975. Major papers focused on the social ecology of carnivores in the Serengeti ecosystem in Africa and a comparison of avian fauna in a disturbed and undisturbed salt marsh in New Jersey. As a boy I visited the Serengeti ecosystem in Africa and saw leopards, now on the threatened and endangered list. I also traveled in the Yucutan region of Mexico for several weeks in 1974 interviewing persons concerned with the status of felid predators.

3. I worked with the Greenpeace organization from 1977 to 1984 on a variety of wildlife and environmental issues, principally the conservation of the great whales. While serving as National Wildlife Coordinator in 1982 I coordinated the organization's effort for the reauthorization of the Endangered Species Act. Other issues I assisted in were: Canadian harp seal hunt, impact of oil spills on marine wildlife, transportation of spent nuclear fuel, and nuclear reactor safety issues, and destruction of coral reefs. During various Greenpeace campaigns I conducted field investigations and advocacy campaigns in Brazil, Chile, Peru, Taiwan, Korea, the Philippines, and Japan. One purpose of these trips was to study and enjoy the endangered and threatened wildlife in these countries.

4. I joined The Humane Society of the United States in January, 1985 as the Whale Campaign Coordinator. In addition to this work, I have assisted in the organization's campaign on the Pribilof seal hunt and investigated the wild bird trade and conservation of tropical rainforests and their wildlife.

5. In October, 1985, I founded the environmental organization TERRA – Tropical Ecosystem Research and Rescue Alliance – whose principal purpose is to conduct research and advocacy programs to promote the conservation of tropical ecosystems, including their endangered and threatened wildlife, and indigenous peoples living in these species-rich habitats.

6. I make this affidavit of my own knowledge and, if called upon to testify, could testify to the matters herein.

7. I visited Brazil and Peru in 1986 between January and April to gain an overview of the problem of deforestation in the Amazon region and to investigate the exploitation of wildlife for the pet trade and biomedical research. This work was conducted on behalf of The HSUS and TERRA. I interviewed numerous environmental activists,

researchers, and government officials about these issues during this trip. I also visited the Carajas iron ore mine, various sections of the Grande Carajas regional development project, which the World Bank is now contemplating financing, and Balbina hydroelectric dam which has received funds from the World Bank. On that trip I observed several species of caimans which will be affected by the Grande Carajas development project. I also visited several areas of active and abandoned cattle pastures and numerous sawmills in the central Amazon region. I discussed the environmental impact of the Polonoroeste project (another project which received extensive World Bank funding) with officials in Brasilia, Porto Alegre, Belem and Porto Velho. I also visited Rondonia where the Samuel Dam is being built with World Bank funding, further jeopardizing endangered species in the area, including jaguars and other tropical rainforest species.

8. On my 1986 trip to Peru I observed and enjoyed the habitat of the endangered jaguar, Uakari, and Geoldi's marmoset. These species and their habitat will be harmed by the Agency for International Development Picchis-Palcazu project. This is a community forestry project doing innovative work on sustainable forestry. Despite innovation, any sustainable forestry is likely to harm the above mentioned endangered species and others in the areas and therefore should be subject to consultation to avoid or minimize their harm.

9. A purpose of my visit to Brazil and Peru was to study the impact of development projects on endangered wildlife and their habitats. During my visit I observed scarlet macaws, toucans, howler monkeys, reptiles, and a variety of psittacine birds in the wild near Manaus, Brazil. I also observed and enjoyed the habitat of the endangered Brazilian three-toed sloth and giant otter. I camped out at a field station near Paragominas, Brazil and observed

bats, numerous birds, and discussed sightings of endangered jaguar with a local researcher. While visiting a jungle site near the Carajas iron ore mine and other secondary development projects related to Grande Carajas in the states of Para and Maranhao, I witnessed numerous bird species, crocodilians, and heard numerous primates in the forest. I observed sloths near Belem and Manaus. I observed Amazon river dolphins, and numerous bird species during boat trips on the Amazon river. I witnessed numerous bird species including psittacines and toucans, and primate species (including a wild sighting of a saddleback' ed marmoset) in the jungle near Iquitos, Peru.

10. Attached hereto is a copy of the newsletter *Liàna* which gives a summary description of this trip. A report on the bird trade will be forthcoming.

11. I will suffer harm in fact as the result of American aided development (via funds provided to support World Bank projects) in Brazil and the above mentioned Agency for International Development project in Peru, among others. As noted above, I have observed threatened and endangered species there and plan to do so again. I appreciate and enjoy their existence in Brazil and Peru.

12. In the future, I plan to visit Rondonia and Acre-sites of the Polonoroeste and Acre road projects (funded by World Bank and Interamerican Development Bank) to study the environmental impact of these projects on the wildlife of these vital Amazon regions. I also plan to visit parts of the Amazon in Peru where U.S. AID has been active in sponsoring various development projects. I plan to return to the Brazilian Amazon to follow-up on the impact of the development projects already mentioned in this statement. Having witnessed the living jungle and some of its abundant wildlife up close and then observed vast tracts of secondary vegetation and land denuded as a result of destruction of the primary forest, I can easily say I have

already experienced harm through the loss of wildlife in the latter areas. As a rate of deforestation continues to accelerate, I will be harmed, in fact, both personally and professionally, by the continuing ill-planned U.S. aided and funded "development" and the immeasurable loss of wildlife which results.

13. The staff and members of The Humane Society of the United States, including myself, will be harmed, in fact, by the loss of threatened and endangered wildlife resulting from the current lack of consultation under the Endangered Species Act regarding the effects of the above described, and other U.S. agency actions on endangered and threatened species overseas.

14. I have a longstanding interest in the international ramifications of endangered and threatened species protection. It is my opinion that the destruction of tropical rainforests represents the single greatest threat to the plant and animal species on this planet.

/s/ J. Campbell Plowden

J. CAMPBELL PLOWDEN

DISTRICT OF COLUMBIA, SS:

Subscribed and sworn to before me
this 6th day of November, 1986.

/s/ Joan P. Spade

Notary Public

My Commission Expires January 11, 1991

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-757

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, AND THE HUMANE SOCIETY OF THE UNITED STATES, PLAINTIFFS

VS.

DONALD P. HODEL, AS SECRETARY OF THE INTERIOR, DEFENDANT

AFFIDAVIT OF AMY SKILBRED

District of Columbia) ss.

Amy Skilbred, as being duly sworn, states:

1. I am a member in good standing of Defenders of Wildlife and have been a member since October 1985. I am also a member of the staff of Defenders of Wildlife.

2. As a member of Defenders of Wildlife staff I have a professional interest in the protection of endangered species and their habitat.

3. I make this affidavit of my own knowledge and, if called upon to testify, could testify to the matters herein.

4. I have visited the areas in and around Kandy, December 1981 and January 1982 I spent a month back-packing, wildlife viewing, and enjoying many of the unique natural areas of Sri Lanka. I intend to revisit the area in the future for similar uses and purposes.

5.A purpose of my visit was to observe the extraordinary wildlife and habitat of this island country, including its endemic and endangered species such as the Asian elephant and the leopard. Unfortunately, during my visit, I was unable to see any of the endangered species. However, I enjoyed knowing they were there and searching for them. I also observed their habitat and other magnificent wildlife.

6. As a member of Defenders of Wildlife and user of the endangered wildlife of Sri Lanka and its habitat, I have a strong interest in the management and use of their remaining habitat as it is integral to their survival. In particular, I am concerned about the effect on these species of the continuing Mahaweli Project, funded, in part, by the U.S. Agency for International Development. According to research by Edward Goldsmith and Nicholas Hildyard and the Environmental assessment of the project prepared by the agency for International Development, this development project will seriously reduce endangered, threatened, and endemic species habitat including areas that I visited; an action which presents the greatest danger to Sri Lanka's wildlife, especially its endemic species and large mammals such as the leopards and elephants which inhabit the project area. The resulting displaced wildlife has very little area in which to seek refuge and the disruption of important ecosystems may severely shorten the future of these species.

7. I have been informed by John Fitzgerald, Washington Representative, Endangered Wildlife, that the Agency for International Development has refused to request or submit to a formal § 7 Consultation with regard to the Mahaweli project.

8. I will suffer harm in fact as the result of American aided development in Sri Lanka. I intend to return to Sri Lanka in the future and hope to be more fortunate in spot-

ting at least the endangered elephant and leopard. I appreciate their existence in Sri Lanka

9. I have a continuing interest in the fate of endangered and threatened species and their habitat internationally, especially where US-funded development may cause the direct loss of these species or their indirect loss due to habitat destruction.

/s/ Amy Skilbred
AMY SKILBRED

DISTRICT OF COLUMBIA, SS:

Subscribed and sworn to before me
this 4th day of November, 1986.

/s/ Roselyn E. Vaccaro
Notary Public
My Commission Expires Feb. 14, 1991

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-757

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, AND THE HUMANE SOCIETY OF THE UNITED STATES, PLAINTIFFS

vs.

DONALD P. HODEL, AS SECRETARY OF THE INTERIOR, DEFENDANT

AFFIDAVIT OF JUDY M. BELLAIRS

State of Minnesota) ss.
County of Hennepin)

Judy M. Bellairs, being duly sworn, deposes and says as follows:

1. My name is Judy Bellairs and I am Issues Coordinator for Friends of Animals and Their Environment (FATE).

2. FATE is an organization formed for the protection of endangered and threatened species and has been a successful litigant in several cases in the District of Minnesota to protect the threatened Eastern timber wolf.

3. I am a resident of the State of Minnesota and have enjoyed, studied, and observed bald eagles and peregrine falcons in Minnesota. Bald eagles and peregrine falcons

are international species with breeding ranges in Canada and the United States and wintering ranges along the Gulf Coast of the United States and Mexico.

4. I enjoy and study the Eastern timber wolf while in Minnesota. The international range of the Eastern timber wolf includes Canada and portions of Minnesota, Michigan and Wisconsin.

5. I enjoy and observe, while in Minnesota, the following migratory song birds:

Eastern kingbirds; great blue herons;
Scarlet tanager, blue-winged teals;
Tree swallows; Baltimore orioles; and
Purple martins.

These birds' winter ranges are in the Central and South American rain forest.

6. The endangered peregrine falcon winters in the Central and South American rain forests and summers in the Arctic. I have observed peregrines in this state, and enjoy their presence.

7. I understand that United States' funded activities in Southeast Asia and in the Amazon threaten existing populations of, among other species, tapirs, Asian elephants, rhinos, tigers, caimons, and jaguars. The presence of diverse species on this planet is spiritually, morally, and esthetically important to me.

8. These activities also threaten my enjoyment of the species in zoos within the United States. These activities also threaten my future, as I hope to study the animals in their native habitats. The Endangered Species Act makes these animals my heritage, and I hope to visit their habitat in the future to study and enjoy the animals.

Further deponent sayeth not.

/s/ Judy M. Bellairs
JUDY M. BELLAIRS

Subscribed and sworn to before me
this 10th day of November, 1986.

/s/ Lori J. Timm
Notary Public
My Commission Expires Sept. 22, 1988

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-757

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, AND THE HUMANE SOCIETY OF THE UNITED STATES, PLAINTIFFS

vs.

DONALD P. HODEL, AS SECRETARY OF THE INTERIOR, DEFENDANT

AFFIDAVIT OF BRIAN B. O'NEILL

State of Minnesota) ss.
County of Hennepin)

Brian B. O'Neill, being duly sworn, deposes and says as follows:

1. I am a member of the bar of this Court.

2. I have been lead attorney on the following environmental matters:

Year	Description
1978	Fund for Animals v. Andrus, 11 Env't. Rep. Cas. (BNR) at 2189 (D. Minn. 1978) (a civil action dealing with wolf predator control tried before Magistrate McNulty in Duluth).

Year	Description
1979-81	Minnesota v. Bergland and the Sierra Club, 499 F. Supp. 1223 (D. Minn. 1980), *affd.*, 660 F.2d 1240 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1981) (a fight over the constitutionality of the 1978 BWCAW Act).
1981	Environmental Quality Board Proceedings on Black Bear Management in Minnesota.
1983-84	Hermann v. Barnes and the Sierra Club, C3-81-1184, a civil action in Chisago County, Minnesota, and the Minnesota Supreme Court (dealing with the liability of property owners for the unencouraged acts of wild animals (in this case beavers)).
1983-84	Friends of Animals and Their Environment v. Nichols, C9-84-40, a civil action in Hennepin County, and the Minnesota appellate courts (an action to force the promulgation of regulations for fur farming).
1984-85	Sierra Club and Defenders of Wildlife v. Clark, 755 F.2d 608 (8th Cir. 1985) (the Minnesota wolf case).
1985	Voyageurs National Park Association v. Arnett, 609 F. Supp. 532 (D. Minn. 1985) (the Black Bay trapping case).
1985	Defenders of Wildlife and Sierra Club v. Hodel, Civ. No. 3-85-1236 (D. Minn. 1985) and related state court actions (the mosquito litigation).
1985	Grand Portage Band v. Minnesota, Civ. 4-85-1090 (D. Minn. 1985) (Indian treaty rights to snowmobile in the BWCAW).
1985	Administrative proceedings with the Fish and Wildlife Service over grizzly bear management in the northern Rockies.

Year	Description
1985	Washington, D.C. lobbying and testimony before Congressional committees on Endangered Species Act reauthorization.
1985-86	Mountain States Legal Foundation v. Clark and the Sierra Club, Civ. 94-1485 (10th Cir. 1986) (dealing with federal regulations of wild horses and burros on the western ranges).
1986	Defenders of Wildlife and the Sierra Club v. Administrator, EPA, Civ. 4-85-687 (a suit to cancel strychnine registrations nationally because of effects on eagles).
1986	Superior National Forest Plan appeal.

/s/ Brian B. O'Neill
BRIAN B. O'NEILL

Subscribed and sworn to before me
this 10th day of November, 1986.

/s/ Lori J. Timm
Notary Public
My Commission Expires Sept. 22, 1988

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-757

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, AND THE HUMANE SOCIETY OF THE UNITED STATES, PLAINTIFFS

vs.

DONALD P. HODEL, AS SECRETARY OF THE INTERIOR, DEFENDANT

AFFIDAVIT OF STEVEN C. SCHROER

State of Minnesota)
) ss.
County of Hennepin)

Steven C. Schroer, being duly sworn, deposes and says:

1. I am an attorney and a member of Faegre & Benson, counsel for plaintiffs in the captioned action. I submit this Affidavit in opposition to the Government's frivolous motion to dismiss this action for an alleged lack of standing or an alleged lack of requisite "adverseness" resulting in an actual case or controversy within the meaning of the United States Constitution.

2. I received my Juris Doctor degree in 1974 from Columbia University in New York City, where I was a member of the Law Review. Thereafter, I served as law

clerk to the Honorable Murray I. Gurfein, Judge of the United States Court of Appeals for the Second Circuit. I commenced my career as a private practitioner with the law firm of Cravath, Swaine & Moore in New York City in 1975.

3. In 1977, I left my position in New York to pursue post-graduate legal studies at the University of Cambridge, England. My studies focused in the area of International Law. I was awarded a Master of Law degree (LL.M.) from the University of Cambridge in International Law. My masters thesis, which is permanently archived in the University of Cambridge Library, dealt with international law regarding anadromous fish species.

4. Upon completing my post-graduate studies in Cambridge, I returned to the United States and in 1978 joined the firm of Faegre & Benson, counsel for plaintiffs in this action. I have been a partner of Faegre & Benson since January 1, 1983, and my specialty since then has been commercial litigation.

5. I have substantial litigation experience in both state and federal courts. I am admitted to practice before the state courts in Minnesota and in New York, the United States District Courts for the Districts of Minnesota and New York, the United States Courts of Appeals for the Seventh and Eighth Circuits, and the United States Supreme Court. I have also appeared as counsel *pro haec vice* in federal court cases litigated in the United States District Courts for the Central District of California, the District of Colorado, the Southern District of Texas, the Western District of Wisconsin, and others.

6. In addition to my training and experience in international law and federal litigation, I have maintained an active interest, both personally and professionally, in environmental and conservation matters. I have acted as associate counsel in several significant environmental

cases litigated before this court, including *Sierra Club v. Clark*, 755 F.2d 608 (8th Cir. 1985) (the Minnesota wolf case).

7. In addition to my professional activities, I am an avid outdoorsmen and conservationist, and have a special interest in sport fishing. I have fished for migratory saltwater species of fish in the territorial waters of Canada, Mexico, Grand Cayman, and the United States. I have fished for anadromous species, such as the salmon and the steelhead, within the national waters of England, Scotland, and the United States. I have also fished for other fresh water fish in the international boundry waters of Canada and the United States.

8. It has been, and I hope will continue to be, a great source and esthetic pleasure for me to pursue my sport fishing activities as described above. In this respect, it is of great personal concern to me that the agencies of the United States Government observe their obligations under the Endangered Species Act and other environmental laws in order to protect my own interest in personally enjoying endangered or potentially endangered fish and other animals both in the United States as well as in other nations.

9. My interest in international fresh water fishing is perhaps best illustrated by the fact that I am a member of several conversation organizations which promote the environment of salmon and steelhead, anadromous species which migrate in and out of territorial and international waters. I am a member of the Atlantic Salmon Foundation, Trout Unlimited, The Federation of Fly Fisherman, and the Catskill Fly Fishing Center. The Atlantic Salmon Foundation, in particular, is extremely active in promoting environmental laws, regulations, treaties, and other private and public international agreements, and also sponsors research to encourage international protection of dwindling salmon fisheries.

10. A simple example of how actions of United States agencies in foreign countries could adversely affect my interests and rights arising under the Endangered Species Act lies in the damming of rivers. As the United States Supreme Court has recognized, the damming of a river may so adversely effect the environment of endangered fishes so as to make such damming improper under the Endangered Species Act. See *Tennessee Valley Authority v. Hill*, 431 U.S. 153 (1978).

11. For an example of how this could operate on an international level, the erection of a dam on the upper stretches of the Kettle or Okanogan tributaries of the Columbia River in British Columbia, as well as the maintenance of such a dam after its erection, could have substantial adverse impact on spawning grounds of certain species of Pacific chum salmon. Such species contribute to the sport fishery in the Columbia River system within the United States in the States of Washington and Oregon, as well as within the territorial Pacific waters of the United States, where salmon migrate after leaving their spawning grounds in Canada.

12. Similarily, the Skagit River, a fine sport river for several species of Pacific salmon, rises in British Columbia and flows through Washington State. Damming of the Skagit in British Columbia—which has been a subject of debate for many years—could destroy spawning runs of dwindling salmon species.

13. If a dam project on the upper Columbia or the Skagit within Canadian territory and cooperation or financial assistance from American authorities were requested, I would be horrified if the affected United States agency would not consult the Fish and Wildlife Service with respect to whether such a project might threaten fish species such as the various types of Pacific salmon which may use the upper reaches of these rivers for their spawn-

ing grounds. The regulations at issue would, in my opinion, illegally prohibit such consultation. I have a substantial interest, both personally and professionally, in challenging these illegal regulations in court.

Dated: November 10, 1986.

/s/ Steven C. Scrhoer
STEVEN C. SCROER

Subscribed and sworn to before me
this 10th day of November, 1986.

/s/ Cynthia R. Nelson
Notary Public
My Commission Expires April 13, 1991

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-757

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, AND THE HUMANE SOCIETY OF THE UNITED STATES, PLAINTIFFS

vs.

DONALD P. HODEL, AS SECRETARY OF THE INTERIOR, DEFENDANT

AFFIDAVIT OF NORMAN COHEN

I, Norman Cohen, am the Environmental Coordinator in the Office of the Administrator of the Agency for International Development. I am responsible for monitoring A.I.D. projects with important environmental consequences and facilitating discussions about those projects with private environmental groups, other government agencies and the Congress.

Because this lawsuit concerns international environmental matters, I have been following its development, reading the parties' pleadings, and reviewing Agency records pertaining to protection of endangered species.

On pages 9 and 10 of the plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss, the plaintiffs set forth a list of projects that they have visited and assert will harm endangered species. Of the eight projects listed, only two—the

Mahaweli Project and Pichis-Palcazu—include some A.I.D. funding. A.I.D.'s involvement in both projects demonstrates that A.I.D. has been and is extremely sensitive to the environmental impacts of its projects, including their effect on endangered species.

The Mahaweli River Basin Project in Sri Lanka involves thirteen donors plus the Government of Sri Lanka and a cost of approximately $2.3 billion. A.I.D. loans and grants for the project total approximately $170 million.

A.I.D. funded preparation of an Environmental Assessment for the entire project, in accordance with A.I.D. environmental regulations. That assessment showed that the project could affect several endangered species. Accordingly, A.I.D. worked with the Government of Sri Lanka to establish four new nature reserves and associated infrastructure and training programs within the project area. In June 1984, the Administrator of A.I.D. received a letter of appreciation from the World Wildlife Fund for helping to promote environmental protection programs in Sri Lanka such as the Mahaweli nature reserves.

The Pichis-Palcazu forestry project in Peru was designed, in part, to maintain the natural rain forest and its flora and fauna (including endangered species). The Government of Peru had originally proposed opening huge tracts of forest in eastern Peru for colonization and intensive development. Such colonization would have effectively wiped out the natural habitats of many local species. A.I.D. environmental and project officers conducted an environmental assessment according to A.I.D. environmental regulations and convinced the Peruvians that no further colonists should settle in the valley and redesigned the project accordingly. The assessment included several technical reports on the projects' impact on local flora and fauna that were carefully considered by A.I.D. and the Government of Peru when redesigning the project.

I declare under penalty of perjury, pursuant to 28 U.S.C. §1746(2), that the foregoing is true and correct to the best of my knowledge and belief.

Respectfully submitted,

/s/ Norman Cohen

NORMAN COHEN

11-19-86

Date

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
722 JACKSON PLACE, N.W.
WASHINGTON, D.C. 20006

JANUARY 5, 1977

Dear Mr. Schreiner:

The Council on Environmental Quality was pleased to review the proposed notice and "Proposed Regulations to Assist the Federal Agencies in Complying with Section 7 of the Endangered Species Act of 1973" transmitted to us by Director Greenwalt's letter of November 11, 1976. These proposed regulations are an important step forward in protecting endangered species and should assist agencies in their consultations with the Service under the Act. In particular, the Council commends the Service for proposing procedures which provide for the application of section 7 to federal activities and programs beyond the geographical jurisdiction of the United States and for its efforts to coordinate its proposed consultation process with established procedures under other statutes. We do, however, have several recommendations concerning the proposed regulations.

One of the crucial issues not adequately addressed in the regulations is the extent to which federal agencies should consult with the Secretary under Section 7. Proposed section 17.93(a)(3) provides that each agency should make an initial threshhold determination as to whether or not an activity or program "may affect listed species or their habitats." If so, the proposed section provides that consultation "should" occur. Left unclear are what criteria should be used by agencies in making this determination, when that determination should be made and whether a consultation request is mandatory or discretionary. Similar uncertainty is found in section 17.93(a)(4) which

provides that the Secretary will request initiation of consultation if he identifies an activity or program that "may affect listed species or their habitat." We recommend that the regulations define "habitat" and specify criteria to be used in determining whether or not an activity or program "may affect listed species or their habitat." We also recommend that the regulations provide that agencies make their threshold determination as early as possible in their planning process and refrain from undertaking any activities or programs subject to the proposed consultation procedure until consultation is complete.

Section 17.93(d) provides that the Secretary will make a threshold determination upon receipt of a request for consultation. It is not clear, however, what criteria should be used by the Secretary to determine whether or not an activity or program "is likely to promote the conservation of listed species" under section 17.93(d)(1) or "is not specifically for the conservation of listed species" under section 17.93(d)(2). The first of these two standards appears to focus on the effect of an action while the other appears to focus on the intent behind the action. These standards should be clarified and criteria for their implementation should be specified.

Criteria should also be specified for the Secretary's determination under section 17.93(d) that an activity "may jeopardize" a species, or result in the "destruction or adverse modification" of its critical habitat. In this regard, it should be noted that since section 7 refers to "modification" of habitat and not "adverse modification" it is unclear that the insertion of the term "adverse" is proper.

Section 17.93(d) does not specify a time period for the Secretary's response to an agency's initial notice of an activity or program. Similarly, no time period is specified for the issuance of biological opinions under section 17.93(e).

If an activity or program would "jeopardize" a species or potentially destroy its critical habitat the Agency should prepare and consider an environmental impact statement for the activity or program. We recommend, therefore, that a maximum time period consistent with existing procedures under the National Environmental Policy Act be specified for the Secretary's response under 17.93(d), and issuance of biological opinions under section 17.93(e). This will promote timely decisions, help reduce paper work and insure compliance with section 17.93(e)(4) which provides that the opinion and any recommendation of the Service will be included in the final documents prepared under the National Environmental Policy Act.

We strongly agree that Section 7 applies beyond the geographical jurisdiction of the United States. We question, however, whether the failure to apply those provisions of Section 7 concerning destruction or modification of critical habitat is consistent with the purposes and policies of the Act, and with the need for a comprehensive and effective international program to restore and protect endangered and threatened species.

We appreciate the opportunity to comment on these proposed regulations.

Sincerely,

Lee M. Talbot
Assistant to the Chairman
for International and
Scientific Affairs

Mr. Keith M. Schreiner
Associate Director, Federal Assistance
Fish and Wildlife Service
United States Department of Interior
Washington, D.C. 20240

REGUTTING: mgw 12/27/76

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JUNE 30, 1978

Honorable Robert C. Brewster
Acting Assistant Secretary of State
Bureau of Oceans and International Environmental and Scientific Affairs
Department of State
Washington, D.C. 20520

Dear Ambassador Brewster:

Thank you for the letter of April 28, 1978 from Assistant Secretary Mink expressing the Department of State's views on the United States Fish and Wildlife Service's final regulations implementing Section 7 of the Endangered Species Act of 1973. Your letter voiced a number of concerns over the extraterritorial application of those regulations to Federal agency activities in foreign countries. With all due respect, I must object to your analysis on this issue and reject your contention that consultation under Section 7 be made discretionary for Federal agencies.

Because of the importance of this matter and the number of areas of disagreement, I will respond to the April 28th letter at some length.

I was initially struck by the inconsistency of the State Department's position on its willingness to consult under Section 7. The letter indicated that the State Department "was anxious to fulfill" its obligation to consult under Section 7 in order to avoid jeopardizing a listed species' continued existence or modifying or destroying its critical habitat. However, you then went on to object to the scope of the Section 7 regulations and their extraterritorial application. Assuming *arguendo* that your objections on extraterritoriality are correct and that Section 7 is limited to Federal activities within the United States, I am at a loss to

determine what consultation obligations would remain for your Department to "anxiously fulfill". Adoption of your interpretation on extraterritoriality would quite obviously excuse you from compliance with the provisions of Section 7. Such a blanket exemption is simply not warranted under the Act.

Your constricted interpretation of agency obligations under Section 7 is equally troubling. The Department of the Interior contends that Section 7 imposes a number of independent burdens upon the agencies of the Federal government. First, the Section directs the Federal agencies to utilize their authorities in furtherance of the purposes of the Act. Second, it imposes a *mandatory* procedural requirement for consultation with the Fish and Wildlife Service or the National Marine Fisheries Service. The rationale for making consultation manditory was discussed at length in the preamble to the final Section 7 regulations, 43 Fed. Reg. 870, 871, and we commend it to your attention. Section 7's third obligation is its direction that *all* Federal agencies insure that the activities that they authorize, fund or carry out do not jeopardize the continued existence of a listed species *or* adversely modify or destroy its critical habitat.

The Fish and Wildlife Service has consistently interpreted these two latter obligations as separate and distinct. Thus, a Federal agency could jeopardize the continued existence of a listed species without any impact upon critical habitat. Such was the case in *Defenders of Wildlife v. Andrus*, 428 F. Supp. 167 (D.D.C. 1977), where attention was focused on the potential for "jeopardy" arising out of the Fish and Wildlife Service's early morning shooting hours for migratory birds. The Court was concerned that reduced light might result in misidentification and shooting of listed species, jeopardizing their continued existence. The impact of those shooting hours upon critical

habitat was never an issue in the case; there was no logical connection between species misidentification and habitat destruction. This case highlights the tenuousness of your position that Section 7's two prohibitions are not severable. The concept of "jeopardy" as defined in the final Section 7 regulations, 43 Fed. Reg. 870, 875 is not limited to matters affecting the habitat of a species and thus is more sweeping in its application than Section 7's admonition concerning critical habitat.

The severable character of these two prohibitions is even more evident when one reflects upon the fact that over 90 resident species of fish or wildlife had been listed as endangered under the two earlier Endangered Species Acts. Subsequently, these species were automatically transferred over as endangered under the 1973 Act. The concept of critical habitat first appeared in the 1973 Act and had not been designated for any of these automatically listed resident species. There is not a shred of evidence in Section 7's legislative history to indicate that Congress granted Federal agencies authority to jeopardize the continued existence of these resident species until the time-consuming process for critical habitat determinations had been completed. Critical habitat for the whooping crane wasn't designated until May of this year. Yet certainly prior to that time, no court would have allowed a Federal agency to jeopardize the continued existence of the whooping crane, the best known endangered species in this country.

As a corollary to this, the Service rejects the contention that consultation under Section 7 and compliance with the "jeopardy" prohibition is impossible, absent a determination of critical habitat. A critical habitat determination is merely an expression in cartographic fashion of existing knowledge on the crucial biological needs of a particular species. The absence of such a map, however, is not to be

equated with the absence of biological information. The consultation process under Section 7 was specifically designed to accomplish the informational "fine tuning" necessitated by the absence of a critical habitat determination. In fact, the vast majority of Section 7 consultations to date have involved species for which critical habitat has not been designated.

In summary, the Fish and Wildlife Service contends that Section 7's prohibitions against "jeopardy" and critical habitat modification or destruction are independent and severally enforceable. Similarly, it is the position of the Service that consultation is mandatory on the issue of "jeopardy," even when critical habitat has not been designated for a particular species.

In light of the above, and in recognition of the legislative history of the Act, the Service has concluded that while the legislative history of the Act supports the application of Section 7's prohibition against "jeopardy" extraterritorially, the Secretary's power to determine critical habitat does not extend to foreign countries. It follows that with critical habitat designations limited to the United States, Section 7's prohibition against its modification or destruction affords no means for extraterritorial application.

While we agree with your recitation of the statutory rule of interpretation on the extraterritorial application of statutes, we disagree with your conclusion that nothing in the legislative history of the Endangered Species Act supports the extraterritorial application of at least part of Section 7.

The Endangered Species Act was premised upon the recognition that the earth's populations of fish and wildlife are international resources requiring multilateral cooperation for their preservation. Since the abandonment of the parochial "native species only" approach of

the first Endangered Species Act, Pub. L. No. 89-669, 80 Stat. 926, the endangered species legislation of this country consistently has reflected an active Congressional concern for conserving fish and wildlife on a world-wide basis. In the opening policy section of the Endangered Species Act of 1973, Congress reaffirmed this international commitment by citing a long list of international conservation treaties and agreements that the Act was designed to support. 16 U.S.C. § 1531.

The jeopardy prohibition of Section 7 is equally sweeping in its intentions; that Section having been construed by the Supreme Court last week as being without limitation in its application. *TVA v. Hill*, No. 76-1701, slip op. at 18, (Sup. Ct., June 15, 1978). By its terms, the jeopardy clause applies to all Federal agencies. There is no exception for agencies involved in foreign countries. Also by its terms, the jeopardy clause applies to all species listed under the Act. There is no exception for foreign species, and most of the animals listed as endangered or threatened are in fact foreign animals. 50 C.F.R. § 17.11. Congress would not have made the jeopardy clause applicable to foreign species if it did not intend the clause to apply to activities taking place in the countries where such species are found.

The Act's legislative history confirms this analysis. Admittedly, the history dealing solely with Section 7 says nothing specifically about its applicability overseas. But Section 7 cannot be isolated from the remainder of the Act. In construing the jeopardy clause, the history of the entire statute must be examined. During the debates leading up to passage, Congressman Dingell, Chairman of the House Subcommittee on Fisheries and Wildlife Conservation and the Environment, made the following observation:

> The purposes of the bill include the conservation of the species and of the ecosystems upon which they de-

pend, and *every* agency of Government is committed to see that those purposes are carried out. It is a pity that we must wait until a species is faced with extermination before we begin to do those things that we should have done much earlier but at least when and if that unfortunate stage is reached, the agencies of Government can no longer plead that they can do nothing about it. They can, and they *must*. The law is clear. 119 Cong. Rec. 42913 (1973) (emphasis added).

In addition, during the House hearings, of which he was Chairman, Congressman Dingell made this statement:

> The point I want you to comearound to understand is that this country wants a management program that is going to maintain these populations *around the world*. Hearings on Endangered Species [H.R. 37 and Others] Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 93rd Cong., 1st Sess. 349 (1973) (emphasis added).

Thus, the legislative history for the Act as a whole shows that the statute is aimed at protecting both domestic and foreign species, and that every federal agency is committed to that aim. In light of that purpose, an argument that the jeopardy clause is not applicable to foreign activities is devoid of support.

It could be argued that the Act's concern for foreign wildlife is limited to the international cooperation provided in Section 8. 16 U.S.C. § 1537. Clearly, Section 8 does afford protection to foreign species through international programs, financial aid, and technical assistance, but that Section is by no means the only provision of the Act protecting foreign species. Section 9, 16 U.S.C. § 1538, con-

tains the most significant protections for foreign species, yet operates independently from the international cooperation provisions of Section 8. Among other things, Section 9 prohibits foreign endangered species from being imported, transported or sold in foreign commerce. Section 9 is applicable to any "person" subject to the jurisdiction of the United States, and "person" includes departments or instrumentalities of the Federal Government. 16 U.S.C. § 1532(8). Moreover, Subsection 9(g) makes it a separate offense to cause or solicit any activity prohibited elsewhere in the section. Violations of Section 9 invoke the penalties of Section 11, 16 U.S.C. § 1540, including substantial civil penalties, fines and imprisonment. The prohibitions of Section 9 support the conclusion that the jeopardy clause of Section 7 applies to Federal activities abroad.

It has also been suggested that the application of the jeopardy clause to overseas activities of Federal agencies would infringe upon the sovereignty of foreign countries by imposing on them the environmental policies of the United States. This argument is not convincing. The protection of foreign species under the jeopardy prohibition is certainly no greater an "infringement" of foreign sovereignty than is the actual listing of those species as endangered or threatened. Section 9's prohibitions on foreign commerce are further examples of "infringements" on sovereignty that Congress felt comfortable in making. Since the Act abounds with such examples, it makes no sense to single out Section 7 for stricter scrutiny. It should also be remembered that Section 7's jeopardy clause directly applies to the activities of Federal agencies, not foreign governments. It is clearly within the power of Congress to impose restrictions upon the implementation of Federal agency programs. Realistically, environmental restrictions on agencies of the U.S. are less an intrusion

into the prerogatives of foreign states than are restrictions on application of foreign aid or conditions on the sale of military hardware.

Other environmental statutes having far less express foreign concern than the Act have been held by the courts to apply extraterritorially. In *Environmental Defense Fund v. Agency for International Development*, Civ. Action No. 75-0500 (D.D.C. 1975), a stipulated settlement approved by the court stated that the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4231 *et seq.*, [hereinafter "NEPA"] applied to an international pest management program sponsored by A.I.D. As a result of *Environmental Defense Fund, supra*, A.I.D. also adopted NEPA regulations for its other international programs. 41 Fed. Reg. 26913, 22 C.F.R. Part 216 (1976). In *Sierra Club v. Coleman*, 405 F. Supp. 53 (D.D.C. 1975), 421 F. Supp. 63 (D.D.C. 1976), NEPA was likewise held to apply to the Federal Highway Administration's construction of the Pan American Highway between Panama and Columbia. And in *Wilderness Society v. Morton*, 463 F. 2nd 1261 (D.C. Cir. 1972), the Court of Appeals for the District of Columbia granted standing to Canadian environmentalists opposed to alternative Canadian routes for the Trans Alaskan oil pipeline. The Court concluded that their concern over the environmental impacts within Canada was within the zone of interest protected by NEPA. It follows that if NEPA is capable of extraterritorial application, so to is the jeopardy prohibition of Section 7, for NEPA has been held to be a reflection of the pervading spirit behind the Endangered Species Act. *Hill, et al. v. TVA*, 549 F.2nd 1064, 1072 (6th Cir. 1977).

I also believe that your Department's concerns over the pace of the consultation process are unfounded. The 60 day turnaround in the final Section 7 regulations is the *maximum* time allotment for consultation; the vast ma-

jority of such consultations have taken considerably less time. Furthermore, the Fish and Wildlife Service is capable of shifting its consultatioin personnel in response to situations requiring expedited decision-making. Thus, in a recent consultation over off-shore oil leasing, the Service was able to conduct the consultation process from start to finish in a couple of days. I am confident that special arrangements can be worked out with the Service in order to accommodate the needs of the State Department for expeditious consultation.

For the reasons stated above, we have concluded that the jeopardy clause of Section 7 is applicable to Federal activities affecting listed species in foreign countries and that consultation on such matters can be successfully concluded. It has been previously noted, however, that the Secretary is not authorized to designate critical habitat overseas. Though nothing in Section 7 *explicitly* excludes the designation of critical habitat in foreign countries, the Department has nevertheless concluded that such an exclusion is properly implied. Section 7 requires that the Secretary, prior to his designation of critical habitat, consult as appropriate with the affected *state* governments. Absent from this section is any requirement of consultation with *foreign* governments which might be affected. Because it is illogical to assume that Congress intended any of the states to be consulted before *foreign* critical habitat is designated, this omission would appear to indicate that Congress had no intention of expanding the concept of critical habitat into the international sphere. Congress obviously felt that the designation of critical habitat within the United States was a sensitive enough activity to require input from the affected state governments.

It seems inconceivable that Congress (had it intended that the Secretary also have the duty to designate critical

habitat in foreign countries) could have concluded that input of a similar nature from the Department of State or the affected foreign nation was unnecessary or undesirable. It is more reasonable to conclude that the Secretary was not intended to become involved in foreign designations.

It is my hope that this somewhat lengthy discussion of Section 7's extraterritorial application will clear up any misunderstandings between our two Departments over this issue. Consultation need not be a burden to Federal agencies if a spirit of cooperation is developed and maintained. I am confident that the Fish and Wildlife Service will make every effort to accommodate the special needs of the State Department. Although it is clear that our legal interpretations of Section 7 differ considerably, it is our hope that the Department of State and the Department of the Interior can cooperate in working out a mutually agreeable process by which both Departments can meet their responsibilities in the spirit of the Act.

I wholeheartedly support your suggestion for an informal meeting between our respective staffs to resolve this matter. I have been informed that 2 p.m. on Mondy, July 10th, would be a convenient time for all parties to meet at the Department of the Interior. Mr. Keith Schreiner, Associate Director for the Fish and Wildlife Service, will take care of the necessary arrangements and will notify you of the location of the meeting. Mr. Schreiner can be reached at 343-4646 if you have any further questions.

Sincerely,

/s/ (Sgd) Bob Herbst

BOB HERBST
Assistant Secretary
Fish and Wildlife and Parks

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

FEB 13, 1976

Memorandum

To Associate Director, Federal Assistance Fish and Wildlife Service

From: Assistant Solicitor, Fish and Wildlife

Subject: Designation of Critical Habitat for Foreign Species

We have reviewed the letter from the Natural Resources Defense Council, Inc. (NRDC), which was transmitted to us with your memorandum dated November 29, 1975. In that letter NRDC asserts that the regulations implementing section 7 of the Endangered Species Act of 1973, 16 U.S.C. § 1536, must designate critical habitat for foreign species. Their position is quite simply that because the critical habitat clause of section 7 is not specifically limited to domestic critical habitat it must include habitats for both foreign and domestic species. Our conclusion is that the Secretary is not mandated by section 7 of the Endangered Species Act to designate critical habitat for foreign species. The considerations discussed below convincingly demonstrate that Congress did not intend the critical habitat concept of section 7 to reach to the extent advocated by the NRDC.

The pertinent part of section 7 reads:

> All other Federal departments and agencies shall utilize their authorities in furtherance of the purposes of this Act . . . by taking such action necessary to in-

> sure that actions authorized, funded or carried out by them do not . . . result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

Though nothing in this statute explicitly excludes the designation of critical habitat in foreign countries, this exclusion is there implicitly. A careful reading of both the Act and its legislative history verify this conclusion.

First, section 7 requires that the Secretary, prior to his designation of critical habitat, consult as appropriate, with the affected *state* governments. Absent from this section is any requirement of consultation with *foreign* governments which might be affected. Because it is illogical to assume that Congress intended any of the states be consulted before foreign critical habitat is designated, this omission would appear to indicate that Congress had no intention of expanding the concept of critical habitat into the international sphere. Congress obviously felt that designation of critical habitat within the United States was a sensitive enough activity to require input from the affected state government. It seems inconceivable that Congress (had it intended that the Secretary also have the duty to designate in foreign countries) could have concluded that input of a similar nature from the Department of State or the affected foreign nation was unnecessary or undesirable. It is more reasonable to conclude that the Secretary was not intended to become involved in the foreign sphere.

This conclusion comes into clearer focus when section 7 is contrasted with those sections of the Act which explicitly deal with the relations between the United States and foreign governments under the Act. In section 4(b)(1), which deals with the listing of species, it is provided that

the Secretary shall consult, as appropriate, not ony with the affected states, but also, in cooperation with the Secretary of State, with the country or countries in which the species concerned is normally found. Clearly Congress knew how to provide for international consultation and communication when it intended the Act's policies to have an international impact.

Further evidence of this is found in section 8, which is entitled "International Cooperation," and contains a series of provisions specifically designed to implement the policies of the Act on a worldwide basis. Each such section is qualified by requirements of either consultation with, or, the consent of, the affected foreign government before the provisions of the subsection operate. Section 8(a), while authorizing the President to use certain funds to provide assistance to foreign countries in the development and management of programs designed to conserve endangered or threatened species, explicitly conditions such expenditure on the consent of the country in question. In section 8(d) the Secretary is mandated to encourage foreign states to engage in programs which further the policies expressed in the Act, as long as this encouragement is coordinated with the Secretary of State. In the other subsections of section 8 similar provisions are made for coordination through diplomatic channels before any of the activities under section 8 is authorized. This sharp contrast with the silence on international relations in section 7 is a clear indication that Congress did not intend the critical habitat provisions of section 7 to extend into the international sphere.

The legislative history, while containing little discussion of the concept of critical habitat, offers additional support for this position. In House Report No. 93-412, 93rd Cong., 1st Sess. (1973), the discussion of section 7(a)

which is identical to the present section 7, indicates it was intended that:

> . . . those agencies take the necessary action that will not jeopardize the continuing existence of endangered species or result in the destruction of critical habitat of those species. *To the extent that those actions involve the protection of habitat, the states must be consulted.* (Emphasis added.) House Report, *supra* at p. 14.

This quotation lends further credence to the limited reading we are giving section 7. The House Report in this sentence limits the Secretary's duty to one of consultation with the *states*. Additionally, it indicates that such consultation is to occur whenever the Secretary designates critical habitat. It is only fair to conclude that Congress intended such designation to be confined to the states, as defined by the Act.

The contrast between the obvious omission of any reference to international relations in section 7 and the careful inclusion of such concerns in other sections of the Act is also paralleled in the legislative history. For example, the House Report states that section 4:

> . . . requires the Secretary to make determinations of endangered status on the basis of the best available evidence after consultation with individuals, organizations, states or foreign countries as appropriate. House Report, *supra* at p. 11.

It is also noteworthy that whenever the international impact of the Act (apart from listing) was discussed in either the reports from the committees or in the debates the references were to section 8. See e.g., House Report, *supra* at p. 2; Conference Committee Report, H.R. Rep. No. 93-740, 93rd Cong., 1st Sess. 26 (1973); 119 Cong. Rec.

25670 (remarks of Senator Tunney); 119 Cong. Rec. 25676 (remarks of Senator Williams).

The preceding discussion is premised upon the conclusion that designation of foreign critical habitats could be an internationally sensitive issue and that this likelihood was perceived by Congress. That conclusion does not seem forced. By restricting the manner in which, for instance, foreign aid funds might be spent, we are imposing a sort of land use planning policy on the foreign nation. While it may be true that many strings are attached to our grants of foreign aid, it is almost certainly true that these programs are coordinated through the State Department. It may seem to a sovereign foreign government rather an invasion of its sovereignty to have the Secretary, without prior consultation and without going through "proper" diplomatic channels, impose upon that foreign government the environmental policies and ideological orientations of this country. Congress demonstrated that it was aware of the sensitivities of foreign sovereignties by providing in section 8 for the use of diplomatic channels when international cooperation seemed desirable.

Judging from the close scrutiny received by this bill in Congress, it is unlikely that the marked difference between section 7 and sections 4 and 3 was accidental. Rather, it is fair to conclude that the absence of any reference to international application of critical habitat in section 7's terms and legislative history is a strong indication that there was no Congressional intent to extend the designation of critical habitat to foreign soil.

Finally, in order to make critical habitat a workable concept it is necessary to operate within specific guidelines. The purpose of the notion of critical habitat is to maintain the viability of an endangered species through the preservation of a land base critically necessary to its continued existence. The application of this notion to the

activities of the Federal Government will require that agencies have advance notice of those areas which have been designated critical habitat, so that in their planning process they can take the prohibitions of section 7 into consideration. Any designation of critical habitat, in order to perform this notice function, will require rather specific land designations. But, nearly insurmountable difficulties arise in obtaining the necessary land descriptions in foreign countries into which access is restricted. Compliance with section 7 either becomes impossible or evolves into an *ex post facto* imposition of sanctions on Federal agencies who had inadequate information as to their likely encroachment on critical habitat.

In these situations the interpretation suggested by NRDC leads to unworkable and unreasonable results. Congress is presumed not to have intended such an interpretation and the statute should be given a construction which avoids such results. A preferable interpretation is that the power to designate critical habitat does not extend to foreign soil.

Concluding that section 7 does not mandate the Secretary to designate critical habitat for foreign species does not, however, absolve Federal departments and agencies from full compliance with all the other requirements of section 7. Neither the legislative history nor the administration realities compel that conclusion. No indication is given in any quarter that Congress intended to excuse agency consideration of the jeopardy resulting from its foreign activities to a listed species' continued existence. Thus, Federal agencies and departments are still required to take "such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species . . . ." Because all Federal agencies must operate under these strict restraints, no violence is

done to the protection afforded by the Act by limiting the designation of critical habitat to areas within the states, as that term is defined by the Act.

/s/ (SGD.) RONALD E. LAMBERTSON
Ronald E. Lambertson

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

12 APR. 1977

Memorandum

To: Director, Fish and Wildlife Service

From: Associate Solicitor, Conservation and Wildlife

Subject: Federal Activities Jeopardizing Foreign Species

On April 22, 1976, the Service issued "Guidelines to Assist the Federal Agencies in Complying with Section 7 of the Endangered Species Act of 1973" [hereinafter "Guidelines" and "Act"]. Section I.A.2 of the Guidelines took the position that under section 7 of the Act, 16 U.S.C. § 1536, federal agencies were required to insure that their actions in foreign countries did not jeopardize the continued existence of endangered or threatened species. Guidelines, p. 3. The Service's proposed regulations on interagency cooperation also take the position that the jeopardy clause of section 7 applies to foreign activities of federal agencies. 42 Fed. Reg. 4868, 4871 (Jan. 26, 1977). Other agencies have challenged the Service's position on the scope of the jeopardy clause and have contended that it does not apply to federal activities abroad. However, for the reasons following, we believe the Service's position is correct and conclude that the jeopardy clause applies to federal activities in foreign countries.

In an earlier opinion dated February 13, 1976, we concluded that section 7 did not mandate the Secretary to designate critical habitat areas in foreign countries. However, that opinion was based on the critical habitat clause

of section 7 and did not analyze the jeopardy clause. Because analysis of the two clauses leads to different conclusions, the two opinions must be read together.

The jeopardy clause of section 7 reads as follows:

> All . . . federal departments and agencies shall . . . utilize their authorities in furtherance of the purposes of [the Act] . . . by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of . . . endangered species and threatened species . . . 16 U.S.C. § 1536.

As a general rule, congressional statutes are construed not to apply outside the territorial jurisdiction of the United States unless an extraterritorial intent is clearly indicated. *Foley Bros. v. Filardo,* 336 U.S. 281 (1949). An extraterritorial intent is clearly indicated for the jeopardy clause of section 7, however, by the language of the section, the wording of other portions of the Act, and the Act's legislative history.

By its terms the jeopardy clause applies to "[a]ll" federal agencies. There is no exception for agencies involved in foreign countries. 16 U.S.C. § 1536; cf. 16 U.S.C. § 1531(c) (stating the congressional policy that "all" federal agencies conserve endangered and threatened species). Also, by its terms the jeopardy clause applies to all species listed under the Act. 16 U.S.C. § 1536. There is no exception for foreign species, and most of the animals listed as endangered or threatened are in fact foreign animals. 50 C.F.R. § 17.11. Congress would not have made the jeopardy clause applicable to foreign species if it did not intend the clause to apply to activities taking place in the countries where such species are found.

The Act's legislative history confirms this analysis. Admittedly, the history dealing exclusively with section 7 says

nothing about applicability overseas. But section 7 cannot be isolated from the remainder of the Act. In construing the jeopardy clause, the history of the entire statute must be examined. During the debates leading up to passage, Congressman Dingell, Chairman of the House Subcommittee on Fisheries and Wildlife Conservation and the Environment, made the following observation:

> The purposes of the bill include the conservation of the species and of the ecosystems upon which they depend, and *every* agency of Government is committed to see that those purposes are carried out. It is a pity that we must wait until a species is faced with extermination before we begin to do those things that we should have done much earlier, but at least when and if that unfortunate stage is reached, the agencies of Government can no longer plead that they can do nothing about it. They can, and they *must*. The law is clear. 119 Cong. Rec. 42913 (1973) (emphasis added).

In addition, during the House hearings, of which he was Chairman, Congressman Dingell made this statement:

> The point I want you to come around to understand is that this country wants a management program that is going to maintain these populations *around the world*. Hearings on Endangered Species [H.R. 37 and Others] Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 93rd Cong., 1st Sess. 349 (1973) (emphasis added).

Thus, the legislative history for the Act as a whole shows that the statute is aimed at protecting *foreign* species, and *every* federal agency is committed to this protection. In light of this overall purpose, any argument that the jeopardy clause is not applicable to foreign activities is simply devoid of logic.

Other environmental statutes, having far less express foreign concern than the Act, have been held by the courts to apply extraterritorially. In *Environmental Defense Fund v. Agency for International Development,* Civ. Action No. 75-0500 (D.D.C. 1975), a stipulated settlement approved by the court stated that the Natonal Environmental Policy Act of 1969, 42 U.S.C. §§ 4231 *et seq.*, [hereinafter "NEPA"] applied to an international pest management program sponsored by A.I.D. As a result of *Environmental Defense Fund, supra,* A.I.D. also adopted NEPA regulations for its other international programs. 41 Fed. Reg. 26913, 22 C.F.R. Part 216 (1976). In *Sierra Club v. Coleman,* 405 F. Supp. 53 (D.D.C. 1975), NEPA was likewise held to apply to the Federal Highway Administration's construction of the Pan American Highway between Panama and Columbia. In *United States v. Mitchell,* 6 Envir. L. Rptr. 20683 (S.D. Fla. 1976), the Marine Mammal Protection Act, 16 U.S.C. §§ 1361 *et seq.*, was held applicable to extraterritorial actions of U.S. citizens. If NEPA and the Marine Mammal Protection Act apply outside the United States, the Act should definitely be held applicable to foreign activities for one of the Act's primary functions is the conservation of foreign species. 16 U.S.C. § 1531(b).

Of course, it is argued that the Act's concern for foreign wildlife is limited to the international cooperation provided in section 8, 16 U.S.C. § 1537. Clearly, section 8 does afford protection to foreign species through international programs, financial aid, and technical assistance, but section 8 is by no means the only provision of the Act protecting foreign species. Section 9, 16 U.S.C. § 1538, contains the most significant protections, and that section operates independently from international cooperation. Among other things, section 9 prohibits foreign endangered species from being imported, or transported or sold in foreign commerce. Section 9 is applicable to any "person" subject to the jursidiction of the United States, and "per-

son" includes departments or instrumentalities of the Federal Government. 16 U.S.C. § 1532(8). Moreover, subsection 9(g) makes it a separate offense to cause or solicit any violation prohibited elsewhere in the section. Violations of section 9 invoke the penalties of section 11, 16 U.S.C. § 1540, and the sanctions of section 11 include substantial civil penalties, fines, imprisonment, and citizen suits. Would Congress subject federal agencies to stiff criminal and civil penalties for causing violations involving foreign species, and yet permit those same agencies to jeopardize the existence of such species through improper foreign activities? Obviously not. The prohibitions of section 9 compel the conclusion that the jeopardy clause of section 7 applies to federal activities abroad.

Nevertheless, it is still argued that section 7's jeopardy clause is inapplicable to foreign activities absent a treaty so requiring; that using the jeopardy clause to curb the overseas activities of federal agencies would infringe on the sovereignty of foreign countries by imposing on them the environmental policies of the United States; and that applying the jeopardy clause abroad would be too burdensome on the agencies, particularly in instances requiring prompt and decisive action.

Suffice it to say that nowhere in the statute or its legislative history is there any indication that applicability of section 7 is contingent upon the conclusion of another treaty. Indeed such a condition would be curious at best given the Act's purpose of implementing existing treaties. 16 U.S.C. §§ 1531(b), 1537(e). With regard to infringing on foreign sovereignty, section 7's jeopardy clause is no greater imposition of U.S. environmental policy than section 9's prohibitions, or than section 11's provision for forfeiting foreign species and products if they are seized by U.S. agents. It should be remembered that the jeopardy clause actually applies only to U.S. agencies, and to the extent such application impacts on foreign governments,

adequate explanation thereof may be properly transmitted through the Department of State. Finally, the burdens on federal agencies imposed by the jeopardy clause may be dealt with and alieviated in the Service's implementing regulations. They are not a reason for denying the clause's foreign applicability altogether.

For the reasons stated above, we conclude that the jeopardy clause of section 7 is applicable to federal activities affecting listed species in foreign countries. This conclusion does not alter our opinion of February 13, 1976, contained in a memorandum to the Associate Director, Federal Assistance, from the Assistant Solicitor, Fish and Wildlife, that section 7 does not authorize the designation of critical habitat areas in foreign countries. As stated in our earlier memorandum, section 7 imposes a condition of direct consultation with the affected state before critical habitat may be designated in that state. 16 U.S.C. § 1536. There being no provision for direct consultation with the affected foreign country, we concluded that Congress did not intend critical habitat to be designated abroad. However, with respect to section 7's jeopardy clause, there is no condition of separate consultation with the affected sovereign, and absent this condition, we believe the jeopardy clause applies to the foreign activities of federal agencies.

ASSISTANT SECRETARY OF STATE
OCEANS AND INTERNATIONAL
ENVIRONMENTAL AND SCIENTIFIC AFFAIRS
Washington, D.C. 20520

April 28, 1978

Mr. Keith M. Schreiner
Associate Director
Federal Assistance
U.S. Fish and Wildlife Service
18th and C Streets, N.W.
Washington, D.C. 20240

Dear Mr. Schreiner:

Thank you for drawing our attention to the final regulations on interagency cooperation under Section 7 of the Endangered Species Act of 1973 (the Act) published by the United States Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) in the Federal Register of Wednesday, January 4, 1978. In light of our comments on the draft regulations, as I am sure you will appreciate, these final regulations cause us some serious concern.

In keeping with the objectives of the Act, the Department is considering internal procedures to assess on a continui ıg basis its activities for any potential harmful impact which might jeopardize the continued existence of a species listed under the Act. We welcome the readiness of FWS and NMFS to provide available technical information which can be invaluable in better enabling us to make such determinations, and we intend to take full advantage of this opportunity for such consultation.

The Department of State fully supports the policy of conservation of endangered and threatened species which is embodied in the Act. We are anxious to fulfill our obligations under Section 7 of the Act to consult with FWS and NMFS to ensure that our activities do not jeopardize the continued existence of endangered and threatened species nor destroy or modify the critical habitats of such species. The Department, however, does not agree with the FWS' and NMFS' interpretation of the scope of the obligation of federal agencies to consult under Section 7 and consequently objects to the scope of the requirement for consultations contained in the regulations.

In particular, we do not concur with the interpretation of the scope of Section 7 which is indicated in Section 402.01 of the regulations with respect to the obligation to consult with FWS and NMFS in order to ensure that agency activities do not jeopardize the continued existence of endangered and threatened species. Our previously expressed disagreement with this interpretation was contained in our letters of September 2, 1976, and December 17, 1976, from Donald R. King, Acting Director of the Office of Environmental Affairs, commenting on the proposed regulations. Our concern is more acute now in view of the fact that the final regulations, unlike the proposed regulations, make the consultation procedure of Section 7 mandatory.

It is a general rule of statutory construction that a statute should have extraterritorial application only if there is clear evidence of such a Congressional intent. In our opinion, there is nothing in the language of Section 7, nor the structure and the legislative history of the Act to indicate that Congress intended that Section 7 would apply extraterritorially. Indeed, the last phrase of Section 7, referring to "habitat . . . which is determined by the Secre-

tary, *after consultation as appropriate with the affected States,* to be critical" (emphasis added) suggests precisely the opposite—that the obligation to consult under Section 7 applies only to federal agency activities having effects in the United States.

Additionally, as a matter of policy, the Department of State objects to the extraterritorial application of Section 7. An analysis by a United States agency of the impacts on endangered and threatened species in, and policy options available to, foreign countries may be perceived by them as an unwarranted interference in matters within their jurisdiction. This is particularly likely in the case of countries which are not parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora. Moreover, the mechanics of complying with the consultation procedure established by the Section 7 regulations would often be incompatible with the speed, confidentiality and flexibility which are prerequisites of effective diplomacy.

Even if the interpretation of Section 7 suggested by FWS and NMFS were correct, we believe the requirements contained in the regulations are unwarranted, and compliance would cause us very serious difficulties. The regulations require federal agencies to determine whether their activities may affect endangered or threatened species outside the United States and to gather enough biological information for the FWS or the NMFS to determine whether the activities will jeopardize the continued existence of such species. By contrast, the regulations are silent on the question of whether the Section 7 requirement to consult with the FWS and the NMFS to ensure that agency activities will not destroy or modify critical habitat applies extraterritorially, and the FWS has implied that it does not by indicating that it does not intend to designate critical

habitat in areas outside the United States. The extraterritorial application of half of Section 7, but not the other half, is illogical because the two obligations imposed by Section 7 are not severable. One of the most fundamental ways in which an activity may be deemed to jeopardize a species' continued existence is by evidence of its harm to the species' critical habitat.

In the absence of the designation of critical habitat outside the United States, the Department of State cannot, as a practical matter, comply with the requirements to consult contained in the regulations. If the agency with expertise in identifying factors crucial to the continued survival of endangered and threatened species finds it difficult or impossible to do so outside the United States, this Department, lacking the necessary expertise, will find the task virtually impossible. It is therefore conceivable that an activity could be indefinitely postponed because we were unable to supply sufficient information to permit the FWS to determine if the activity would jeopardize the continued existence of an endangered or threatened species abroad.

For the above reasons, this Department feels that an extraterritorial interpretation of Section 7 must not be reflected in the regulations or, at the very least, consultations on impacts in foreign jurisdictions should be made discretionary with each federal agency.

Our legal, policy and practical difficulties with the final regulations do not indicate a lack of concern on our part for the fate of endangered and threatened species outside the United States. As you know, this Department has strongly supported international efforts aimed at conservation of fish, wildlife and plants facing extinction. We intend to pursue all practicable measures to protect endangered or threatened species outside of the United States. These measures may include consultations with

other nations on the impact of particular activities on endangered and threatened species and the provision of financial and technical assistance for efforts to protect such species. In both multilateral and bilateral contexts, we are promoting the development of international law for the conservation of species facing extinction. As our efforts expand, we will engage in a continuing review with a view to improving them, while bearing in mind the needs of diplomacy and respect for national jurisdiction. We would welcome an opportunity to discuss our difficulties with the final regulations and possible measures to protect endangered and threatened species with you.

Very truly yours,

/s/ Patsy T. Mink

PATSY T. MINK
Assistant Secretary

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, D.C. 20515

JOHN D. DINGELL
16th District, Michigan

July 10, 1978

The Honorable Cyrus R. Vance
Secretary
Department of State
Washington, D.C. 20520

Dear Mr. Secretary:

I am aware that within the State Department there is some degree of uncertainty with respect to the applicability of the Endangered Species Act, particularly section 7, to extraterritorial actions by the State Department. Quite frankly, I am surprised that there is any confusion whatsoever regarding this matter in light of both the language and legislative history of the Act.

As author of the Endangered Species Act of 1973, I feel it is manifestly clear that the Act applies to the actions of all Federal agencies. Section 2(c) of the Act states:

> "It is further declared to be the policy of Congress that *all* Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act." (emphasis supplied)

An important justification for this legislation was the fact that actions of a majority of the Federal departments could conceivably and adversely affect endangered and threatened species of animals and plants as well as their critical habitats.

This line-of-reasoning is reinforced by the language of section 7 of the Act which states:

> "The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. *All* other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize these authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered and threatened species . . ." (emphasis supplied)

The clear intent of this Act was to protect endangered and threatened species of the world community. When the Endangered Species legislation (H.R. 37) was debated and passed by the House on September 18, 1973, I stated the following on the record:

> ". . . it is a bill which has been carefully drafted to encourage state and foreign governments to develop healthy stocks of animals occurring naturally within their borders."

Likewise, during the Floor debate, Congresswoman Sullivan stated that, "the purpose and intent of the bill before you is to bring into focus the costs of further endangering the plants and animals of the world."

To accomplish this purpose and goal, it was intended that the consultation procedures established in section 7 of the Act apply not merely to just a select few government agencies but to all government agencies. Extraterritorial actions by the State Department – which very well might adversely affect the integrity of endangered or threatened species – were never exempted or intended to be exempted from this process. Both sections 2 and 8 of the Act clearly contemplate that the Convention on International Trade in Endangered Species of Wild Fauna and Flora as well as

other international agreements be used as an integral component in the implementation process. The absence of effective State Department participation in this process would be preposterous.

I am greatly troubled that the Department of State may possibly have an unclear perception of the intent of this Act. Because I am so advised that a conflict may very well exist at this juncture, I would appreciate receiving your policy statement specifically addressing the question of the Endangered Species Act's applicability to extraterritorial Departmental action. I would appreciate an expeditious response to my inquiry and would hope that this matter soon can be resolved.

Thank you in advance for your cooperation in this matter.

With every good wish,

Sincerely yours,

John D. Dingell
Member of Congress

Wc

cc: The Honorable Robert C. Brewster
The Honorable Robert L. Herbst

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
Washington, D.C. 20314

Reply to Attention of: DAEN-CCJ

20 July 1979

Mr. Robert S. Cook
Acting Director
Department of Interior
Fish and Wildlife Service
Washington, D.C. 20240

Dear Mr. Cook:

Thank you for the opportunity to comment on the draft proposed regulations to implement Section 7 of the Endangered Species Act of 1973, as amended, invited by your letter addressed to the Chief of Engineers and dated 13 June 1979.

While this office was unable to analyze and respond to those draft regulations within ten working days after receiving them, Mr. David Wesley of the Service has assured Mr. Bushman of my staff that our comments can be considered if received on 20 July 1979, or very soon thereafter.

Please find attached the comments of the Civil Works Directorate of the U.S. Army Corps of Engineers, which I trust you will find helpful.

Sincerely yours,

/s/ Hugh G. Robinson

HUGH G. ROBINSON
Brigadier General, USA
Acting Director of Civil Works

1 Incl
As stated

Section 402.01 Scope

Section 402.01 of the draft proposed Interior/Commerce regulations describes the "scope" of the regulations: i.e., to interpret and implement Section 7(a)-(d) of the Act. As explained above, the Act authorizes Interior and Commerce *only* to interpret and implement *their own* specific responsibilities under the Act, and to establish reasonable terms under which Interior and Commerce will consult with and advise other Federal agencies. If the draft proposed regulations go beyond that point, to instruct other Federal agencies how they must interpret and implement *their* responsibilities under the Act, that would be inappropriate and, moreover, *ultra vires*.

Section 402.02 Definitions

1. The proposed definition of "activities or programs" would continue an unsubstantiated and not-legally-authorized assertion which now appears in 50 CFR Section 402.01: i.e., that Section 7 restricts the activities of Federal agencies within the territorial jurisdiction of foreign countries. The Memorandum Opinion of the Assistant Solicitor for Fish and Wildlife, Office of the Solicitor, U.S. Department of the Interior, dated February 13, 1976, presents much of the evidence (e.g., from legislative history) which indicates that Congress did *not* intend Section 7 to apply to the territory of foreign nations. Even though that Solicitor's opinion concludes that Interior and Commerce should not attempt to designate *critical habitat* in foreign states, the evidence presented in the opinion demonstrates that the entirety of Section 7 applies to United States territory, not to foreign countries. By analogy, the holding and reasoning of the U.S. Circuit Court of Appeals for the Fifth Circuit in *U.S. v. Mitchell* (553 F.2d 996, 5th Cir. 1977) supports the conclusion that no part of Section 7 ap-

plies to the activities of United States Government agencies on the lands or territorial seas of foreign sovereignties.

An overseas mission of the U.S. Army Corps of Engineers provides a case example demonstrating why the terms of Section 7 should not be stretched to control U.S. Government activities in foreign nations. The Corps of Engineers serves as the contracting/engineering/construction agent for large-scale "nation-building" programs in Saudi Arabia, thereby serving U.S. diplomatic and economic interests. If the Saudi Government chooses to build a facility on a given site, the Corps could not reasonably or appropriately interfere with that decision because some endangered species might be disturbed (unless, of course, the Saudi Government were to instruct the Corps to protect the species). In addition, U.S. national defense activities abroad could be seriously hampered if U.S. agencies must act to protect endangered species for which the host foreign government has no concern or regard.

DEPARTMENT OF STATE
Washington, D.C. 20520

July 31, 1979

Mr. Harold J. O'Connor
Acting Director
United States Department of Interior
Fish and Wildlife Service
Office of Endangered Species
Washington, D.C. 20240

Dear Mr. O'Connor:

Thank you for giving us the opportunity to review the draft proposed regulations being jointly issued by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) to amend the existing regulations concerning consultations under Section 7 of the Endangered Species Act Amendments of 1978.

The proposed regulations preserve an element – applicaiton to the high seas and foreign countries – which is of great concern to this Department, as your office is aware. As we explained in a letter dated April 28, 1978, from Patsy T. Mink, then Assistant Secretary for Oceans and International Environmental and Scientific Affairs, this Department does not concur with the interpretation that federal agency obligations under Section 7 extend to actions having effects on the high seas or in foreign countries.

Our conclusion that Section 7 does not as a legal matter apply extraterritorially is based upon the rule of statutory construction that a statute should have extraterritorial application only if there is clear evidence of such a Congressional intent. We have found no indication in Section 7

and its legislative history of an intent to apply the requirements of Section 7 extraterritorially.

The language of Section 7 contains evidence that Congress intended it to apply only to the domestic activities of federal agencies. The section states in pertinent part:

> "Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded or carried out by such agency (hereinafter in this section referred to as an 'agency action') does not jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, *after consultation as appropriate with the affected States,* to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section." (Emphasis added.)

The fact that the section refers to consultation with "affected States," and does not provide for consultation with affected countries through the Secretary of State, strongly suggests that Congress intended it to apply only to agency actions having effects within the United States. We do not find persuasive the FWS' argument that the requirement of Section 7 to avoid jeopardy of an endangered or threatened species and the requirement to avoid adverse modifications of critical habitat are severable, the first applying to agency action everywhere, the second applying only in the United States. Not only do we find it difficult to believe that Congress could have intended different territorial application within two phrases of the same sentence, but we believe the two requirements cannot be completely severed, as one of the most likely ways an action could jeopardize the continued existence of an en-

dangered or threatened species could be by destroying or adversely affecting its critical habitat.

The 1978 amendments to Section 7 provide further support for the view that Section 7 does not apply extraterritorially. The Endangered Species committee created to grant exemptions from the Section 7 requirement is composed of seven members including an individual appointed by the President from each affected State. The Secretary of State is not a member of the Committee. The inclusion of individuals from the affected States is evidence that Congress considered Section 7 to be applicable to agency actions having effects within the United States. The exclusion of the Secretary of State, whose invlovement as the official responsible for the day-to-day conduct of foreign policy, is provided for everywhere in the act where foreign policy concerns are involved (e.g., in Section 4 concerning the listing of species outside the United States) supports the some conclusion, as does the failure to provide foreign countries with the option of seeking an exemption.

Our interpretation of Section 7 is bolstered by the decision in *United States v. Mitchell,* 553 F.2d 996 (5th Cir. 1977), where the court was faced with the question whether the Marine Mammal Protection Act of 1972 (MMPA), 16 U.S.C. Section 1361, *et seq.*, which was designed to protect species of marine mammals, should be applied to regulate the conduct of U. S. nationals in foreigh territories. The court stated the rule of statutory construction concerning extraterritorial application as follows: If the nature of the law does not mandate its extraterritorial application, a presumption arises against such application; to overcome this presumption, a clear expression of Congressional intent must be shown.

The *Mitchell* court noted that because conservation statutes, like the MMPA, deal with the exploitation and

preservation of natural resources, they are limited by the authority of other sovereign states to control the use of natural resources within their own territories. Other countries may, of course choose to observe different priorities in the exploitation of their natural resources. In the absence of an explicit indication of intent, the court was not willing to presume that Congress intends to make choices for other countries concerning effects on resources within their jurisdiction. In addition, the court found in a separate section of the MMPA, which authorizes the Secretary of State to negotiate bilateral and multilateral agreements to protect marine mammals, evidence of Congressional intent to deal with marine mammal protection in foreign countries through negotiation and agreement, rather than through imposition of one particular choice extraterritorially.

The reasoning of the *Mitchell* case is clearly applicable to the ESA. Notably, the ESA also contains a separate section, Section 8, establishing the United States approach to international protection of endangered species. Section 8 implements the Convention on International Trade in Endangered Species of Wild Flora and Fauna and other treaties listed in ESA, Section 2, by authorizing the President to designate a Management Authority which will "do all things assigned to [it] . . . under the Convention, including the issuance of permits and certificates" for the importation or exportation of endangered species listed in the Annexes to the Convention. Executive Order No. 11911, 41 Fed. Reg. 15683 (1976), appointed the Secretary of the Interior as the Management Authority and spelled out procedures for the Convention's implementation by the United States. Under the Convention, other states parties are similarly obligated to set up management authorities to supervise implementation of the Convention within their respective jurisdictions.

In addition, Section 8 authorizes the Secretary of the Interior, through the Secretary of State, to (1) use foreign currencies generated under PL-480 for the purpose of furnishing assistance to foreign countries in the development and management of programs useful for the conservation of endangered and threatened species; (2) encourage foreigh countries to provide for the conservation of fish or wildlife including endangered species and threatened species listed pursuant to Section 4; (3) encourage the entering into of bilateral or multilateral agreements with foreign countries to provide for such conservation; and (4) encourage foreign persons who directly or indirectly take fish or wildlife in foreign countries or on the high seas for importation into the United States for commercial or other purposes to develop and carry out conservation practices designed to enhance such fish or wildlife and their habitat. Section 8, like the comparable section in the MMPA, evidences a Congressional intent to deal with endangered species protection outside the United States through bilateral or multilateral negotiation and agreement rather than unilaterally.

As we have noted previously, were Section 7, particularly as altered by the 1978 amendments, to apply extraterritorially, it would be in many ways incompatible with the prudent conduct of foreign relations. Foreign countries are likely to regard analyses by United States agencies on endangered and threatened species in their territory and policy options available to them as intruding in matters within their jurisdiciton. As a result, some countries may be unwilling to permit the gathering of information in their territories or to supply information available to them. In addition, the rigid procedural requirements and absolute requirements for biological assessments, consultations, and biological opinions set out in Section 7 are

not realistic in the context of actions having effects outside the United States, where the need to work with other countries requires cooperation, flexibility of timing and, in some cases, confidentiality.

I am confident that you will appreciate that, while we disagree with your interpertation of Section 7's application to the effects abroad of federal agency actions, we are very concerned about the fate of endangered and threatened species on the high seas and in foreign countries. As you know, this Department has strongly supported international efforts aimed at conservation of fish, wildlife and plants facing extinction. We do not believe that adequate interagency discussion has taken place on this issue. We would appreciate the opportunity to continue the discussions initiated earlier between the Department of the Interior and the foreign affairs agencies concerning the proposed regulations and possible measures that might be taken consistent with other obligations, to protect endangered and threatened species.

Sincerely yours,

/s/ William Alston Hayne

WILLIAM ALSTON HAYNE
Deputy Assistant Secretary
for Environmental Affairs

L/OES:MMcLeod:sc
7/31/79:Ext 21989

Clearances: OES/ENE:DRKIng
L:MBFeldman
OES/ENH:WHMansfield

DEPARTMENT OF STATE
AGENCY FOR INTERNATIONAL DEVELOPMENT
Washington, D.C. 20523

August 8, 1979

Mr. Harold J. O'Connor
Acting Director
Fish and Wildlife Service
Department of Interior
Washington, D.C. 20240

Dear Mr. O'Connor:

Thank you for the opportunity to comment on the draft regulation proposed by the Fish and Wildlife service (FWS) and the National Marine Fisheries Service amending existing regulations regarding section 7 of the Endangered Species Act to conform to the 1978 amendments to section 7.

The Department of State, in a letter form William Alston Hayne, Deputy Assistant Secretary for Environmental Affairs, to you, dated July 31, 1979, states the Department's view that section 7 does not have extraterritorial application. A.I.D. agrees with this conclusion. This is a position we have presented to FWS on numerous occasions.

We believe the proposed regulations establish procedures which would cause unnecessary and unacceptable delays in conducting assistance activities in foreign countries. In addition, the regulations do not address foreign policy sensitivities or establish procedures for considering the views of foreign soveriegns, in whose territories assistance activities are conducted, regarding their development objectives, public interests, national

priorities, or their own plans for protecting endangered or threatened species and critical habitat.

Proposed amendments to A.I.D.'s environmental procedures, including a section regarding endangered and threatened species, will soon be published in the Federal Register for public comment. These procedures were discussed with representatives of enviromental organizations and federal agencies, including FWS, on June 19, 1979, prior to our receiving a copy of your draft regulations regarding section 7.

A.I.D. proposes to use these amended environmental procedures to protect endangered and threatened species and their critical habitat. I would be pleased to meet with representatives of the FWS to discuss in greater detail this proposal and other aspects of the draft FWS regulations regarding section 7.

Sincerely yours,

/s/ ALBERT PRINTZ

Albert Printz
A.I.D. Environmental Coordinator

OFFICE OF THE ASSISTANT SECRETARY
OF DEFENSE
WASHINGTON, D.C. 20301

IR
MANPOWER
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AND LOGISTICS

9 AUG 1979

Harold J. O'Connor
Acting Director
Fish and Wildlife Service
U.S. Department of the Interior
Washington, D.C. 20240

Dear Mr. O' Connor:

This is an interim response to your letter of June 12, 1979 to the Secretary requesting the comments of the Department of Defense on draft proposed regulations to implement revised Section 7 of the Endangered Species Act of 1972, as amended.

Our review is still incomplete principally since we are concerned with three aspects of the proposed regulation as follows:

(a) The authority for the Department of the Interior to issue regulations on the consultation aspects of the revised Section 7.

(b) The requirement in Section 402.01 of the proposed regulations regarding consultation on each project that may impact a threatened or endangered species on the high seas or in foreign countries.

(c) Participation of the U.S. Fish and Wildlife Service in the preparation of additional studies as part of the biological assessment under Section 402.04, Biological Assessments for Construction Projects.

Our review should be completed by the end of August 1979 at which time we will communicate further with you. We regret our delay in responding but believe the rulemaking and international consequences of your proposal merit this additional time.

Sincerely yours,

/s/ PERRY J. FLIAKAS

Perry J. Fliakas
Deputy Assistant Secretary of
Defense
(Installations and Housing)

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

AUG 8, 1979

MEMORANDUM

To: Assistant Secretary, Fish and Wildlife and Parks

From: Solicitor

Re: Endangered Species Act of 1979 Amendment Regulations

You may recall that when the existing regulations on the Endangered Species Act were published in 1978, they asserted the position that the Endangered Species Act applies to U.S. governmental agency actions abroad. These regulations were published over the objection of the State and Defense Departments. Those Departments did not, however, elevate the issue for a Presidential decision. At the time, they were vigorously debating the international application of NEPA.

Following the amendments to the Endangered Species Act, the regulations must now be amended as well. Those amendments carry forward this legal position and, I understand, provide future guidance with regard to procedures for consultation in the international context. The State and Defense Departments have again objected on policy and legal grounds and are now prepared to have the matter resolved at the White House, if necessary.

I have not personally reviewed the legal and/or policy issues involved, but plan to do so immediately. If I am convinced that the Endangered Species Act does have international application, the matter will have to be resolved

by Justice or the White House. Consequently, please do not promulgate these amended regulations into final until I have personally surnamed them. I would also like to know the significance of delaying the publication of the final regulations for a brief period while we sort out this difficult issue.

/s/ LEO KULIZ

Leo Kuliz
Solicitor

UNITED STATES GOVERNMENT

MEMORANDUM

Date: March 26, 1980

Reply to
Attn of: David A. Ferguson

Subject: Accelerated Mahaweli Project (AMP)/U.S. AID Program to Develop the Water Resources of Sri Lanka

To: Chief, International Affairs

Following the initial 1978 consultations with FWS, AID has maintained a fairly low profile in their coordination on the Mahaweli Project with us until recently. Two meetings (January 29 and February 28, 1980) were held between AID and Service personnel (see attached draft memorandum from Dick Mitchell, OES, to Chief, OES).

Since AID's interest in having FWS participation seems to have increased, Dr. Mitchell felt that any Service participation should logically be coordinated through the IA office. Thus, with my agreement he set up a meeting with Mike DeMetre, AID Mahaweli Project and Jane Stanley, Asia Bureau Environmental Officer.

We met at the Rosyln AID Asia Bureau Office on March 17, 1980. Besides DeMetre and Stanley from AID, Dick and Lynn West from OES and I formed the Service contingent. Jane gave us copies of the TAMS (Tippetts, Abbett, McCarthy and Stratton) "Environmental Assessment Mid Term Report" dated 1 Feb 1980 as well as a report entitled "Annex X, Environmental Aspects Mahaweli Ganga Development Program Implementation Strategy Study" dated Sept 1979. The latter report was done by a Dutch consultant (Nedeco) for the Netherlands Ministry of Foreign Affairs.

Jane was putting together a letter of comment on the TAMS report for the AID Mission in Sri Lanka and asked us to provide comments to her on the TAMS report by March 28 so she could get the letter off the first week in April. We agreed.

AID's commitment to the Mahaweli Project is $100 million which is the largest single project in AID's budget. Both the Administrator of AID and Deputy Administrator of AID are supportive of doing environmental work in Sri Lanka. The AID Sri Lanka Mission Director Sarah Jane Littlefield, and the Project Officer, Jeff Evans, in the Mission, are likewise very supportive. Jeff has been working closely with the host government which is vitally concerned with the wildlife aspects.

Mike indicated the project area was divided into four parts denoted as Systems A, B, C, and D. AID was involved with System B; World Bank with C. B is the largest of the four land areas to be developed under irrigated agriculture in the AMP and along with System C will be the initial area to be developed under the program. Not only is AID responsible for the design and construction of the canal works in System B, but for mitigation of negative environmental effects of the accelerated Mahaweli program.

At the earlier meetings with Mitchell, Stanley gave him copies of Volumes I-III of the System B Design and Supervision Plan. According to Stanley the next step in the process is to produce a Construction Paper for System B (In the AID process there are two parts to the construction paper phase (1) PID-Project Identification Document – briefly describing the plan, and (2) Project Paper – the final project plan). The Construction Paper is to be started this summer for AID/D. approval in November 1980 or Janary 1981.

At the same time the PID is started, work will begin on the Wildlife Project. This latter project will discuss mitigation of negative environmental effects of the AMP. It will probably include assisting, training, and equipping the staff of the Sri Lanka Department of Wildlife Conservation. Jane had no idea of what the cost budget for this would be as of yet. The project will probably be put together by a person from TAMS, although the alternate decision will be made by the Mission. It will have to come to D.C. for approval.

Mike and Jane are looking to the Service for assistance in reviewing the TAMS report, providing information on threatened and endangered species, identifying Sri Lanka's wildlife expertise and advising on overall wildlife aspects of the project. They see the definition of base line resource information and the recording of changes as important in predicting possible impacts. Mike was enthusiastic about using remote sensing as an operational tool in recording animal movements, such as elephants, as well as habitat changes (we promised to supply him with contacts for such work).

Stanley and DeMetre would like to be able to take the TAMS material from System B and see if it could be integrated with System C. Mike felt that the World Bank should be interested in this aspect as they were involved with System C; that Bob Goodland, Environmental Officer at the Bank, might go along with some kind of grant to study the environmental aspects.

Jane expected that the Mission would ask her to lay out the basis for the P.I.D. on the Wildlife Project and she might ask the Service for help.

Mike was planning a ten-day trip to Pakistan, Sri Lanka and Bangladesh from April 14-24, 1980 and would be asking what was being done on plants and remote sensing. He

would advise the Mission the Service was willing to provide some assistance on points mentioned above and would set up arrangements for Dick Mitchell's visit in late July 1980.

Attachment

cc:
IA Read File
Sri Lanka-Mahaweli File
Dr. Richard Mitchell, OES

FWS/IA:DFerguson:cb 3/27/80

In Reply Refer To:
FWS/OES

May 9, 1980

Mr. Albert C. Printz
Environmental Affairs Coordinator
Agency For International Development
U.S. Department of State
Washington, D.C. 20523

Dear Mr. Printz:

In response to your request, I am enclosing the following: (1) Comments on the Mid-Term Report of the Environmental Assessment of the Accelerated Mahaweli Development Program, Sri Lanka; (2) Recommendations; (3) List of Contacts. These should not be considered as the official position of the U.S. Fish and Wildlife Service (FWS) on this project. Although you have indicated that this request for assistance should not be construed as a request for consultation under Section 7 of the Endangered Species Act, I wish to emphasize that our willingness to be of assistance on Endangered species problems does not negate our belief that overseas projects conducted by United States agencies require Section 7 consultation if listed species may be affected. We are willing to provide the assistance requested, open up avenues of cooperation, and provide assistance on other U.S. Agency for International Development (AID) projects. We feel that this is an important step in interagency cooperation and in the conservation of listed species.

As requested in your letter to Mr. Ronald E. Lambertson, FWS and AID representatives met on January 29, 1980, to disuess this Service's possible role in furnishing expertise and recommendations to AID in order to alleviate negative impacts of the AMP on listed species. Two

additional meetings were held (February 28 and March 17, 1980) with U.S. AID/Asia representatives (Mike DeMetre, Jane Stanley) and representatives of the International Affairs Office (IA) (David A. Ferguson) and the Office of Endangered Species (OES) (Dr. Richard M. Mitchell). As agreed to in these meetings, the FWS is furnishing AID with a list of experts on the flora and fauna of Sri Lanka, along with our comments on the Mid-Term Report and recommendations for alleviating negative impacts to wildlife, especially Threatened and Endangered species.

The Accelerated Mahaweli Development Program presents a unique opportunity for AID to demonstrate to Third World Nations that development and wildlife preservation can go hand-in-hand in well-thought-out projects. AID has taken the initiative and has sponsored and financed the Environmental Assessment for the entire Accelerated Mahaweli Project (AMP); even though their involvement is only with the financing of the design, construction, and supervision of the main and major branch canals in System B. AID is concerned about the continued existence of Endangered and Threatened species in Sri Lanka and has asked FWS for their assistance in preparing recommendations on ways to minimize or eliminate the negative impacts to listed species. AID plans to assist the Sri Lankan Department of Wildlife Conservation and has appropriated $400,000 for FY 81 to train and equip the wildlife department staff.

This is an important beginning to alleviate negative impacts to wildlife and listed species. The magnitude of the Accelerated Mahaweli Development Program could have massive environmental impacts on such an insular ecosystem as the Mahweli River system. There are several factors that favor the wise development of this project with minimum impact to the environment and wildlife: 1) The Sri Lankan government realizes the importance of the

wildlife as part of their national heritage. 2) The government has a good wildlife parks system and a functional Department of Wildlife Conservation. 3) The fauna and flora of Sri Lanka is well-studied and competent personnel are present within the country. 4) U.S. AID has undertaken the obligation to assist the Sri Lankan government in trying to minimize the negative impacts that this massive project could have on wildlife.

With long-term assistance (5-10 years) from the institutions sponsoring the AMP, Sir Lanka could be a showcase to developing nations on how to develop their potential resources with minimum impact to the environment and wildlife. The Sri Lankan government lacks the necessary finances to undertake any long-term management programs to avoid the negative impacts to the wildlife. The donor nations and agencies that are financing the AMP will be the key as to how successfully the wildlife is preserved. If wildlife problems receive the same level of attention as the engineering project, then the negative impacts to the environment can be alleviated. This means that there has to be long-term funding in sufficient amounts to stem the negative impacts of this project.

Sincerely yours,
JOHN L. SPINKS, JR.
Director

Enclosures

cc: Directorate Reading File
DD Chron File

FWS/OES:RMitchell:sm 5/5/80

ASSISTANT SECRETARY OF STATE
OCEANS AND INTERNATIONAL
ENVIRONMENTAL AND SCIENTIFIC AFFAIRS
Washington, D.C. 20520

April 20, 1981

Mr. G. Ray Arnett
Assistant Secretary Designate
for Fish and Wildlife and Parks
Department of the Interior
Washington, D.C. 20240

Dear Mr. Arnett:

On February 24, 1981 Dr. F. Eugene Hester, Acting Director of the U.S. Fish and Wildlife Service, circulated to the Department of State and other Federal agencies revised draft proposed regulations to govern consultations under Section 7 of the Endangered Species Act. We have carefully reviewed the draft proposed regulations.

For a number of reasons, the Department of State is strongly opposed to the proposed regulations.

As we have informed your Department on a number of occasions, the Department of State does not share the view that the consultation procedures under Section 7 of the Act are applicable to actions of Federal agencies having effects on the high seas or in foreign countries. We find no evidence in the Act itself to support this view, and we find considerable evidence in the Act and in established rules of statutory construction to the contrary. For this reason, we strongly believe that if the proposed regulations are to have a sound legal basis they must be be redrafted to make clear that they do not apply to Federal agency actions having effects on the high seas or in foreign countries. (A copy

of our letter of July 31, 1979 to Mr. Harold J. O'Connor, with a legal analysis, is attached for your reference.)

Promulgation of the proposed regulations in their present form, if upheld, would create a number of serious problems for the Department of State, as well as for other Federal agencies.

The proposed regulations would impose substantial new personnel, financial, and paperwork requirements on the Department. This would be directly contradictory to one of the Administration's major objectives, that of reducing the regulatory burden. In our view the proposed regulations do not meet the requirements of Executive Order 12291, and I doubt that the proposed regulations will survive scrutiny by the Vice-President's task force or OMB. There is also an important practical consideration. Under the present reality of severe budgetary and personnel constraints, it is most unlikely that additional funds or personnel would be made available to the Department or to any other affected agency to discharge the many obligations envisaged by the proposed regulations. Thus, any attempt by the Department to fulfill these obligations would require the reallocation of resources from other, ongoing activities. The Department, as is the case with many Federal agencies, has already been required to accept significant budget and personnel restraints, and is not in a position to cut further our essential and established activities to execute the new obligations envisaged in the proposed regulations. In this regard, I might note that the proposed regulations would also impose substantial new obligations on the U.S. Fish and Wildlife Service. I assume that the Service is operating under the same budget and personnel constraints as this Department, and I wonder whether the Service has adequately considered its ability to execute the new obligations, and which ongoing programs it would cut to obtain the necessary personnel and funds.

The proposed regulations would likely cause significant foreign policy problems for the United States. In the first place, another sovereign country within whose territorial jurisdiction a proposed Federal action is to occur will have already determined that the proposed action is in its national interest, taking into account a range of considerations and its own priorities. There is very likely to be serious resentment by the foreign country if the ability of the United States to participate in such an action is negated, delayed, or made more expensive as a result of requirements imposed extraterritorially by U.S. law. This resentment can spill over into other aspects of the bilateral relationship, to the detriment of the overall interests of the United States. In more specific terms, fulfillment of the many requirements envisaged in the proposed regulations would be incompatible with the requirements of effective diplomacy, such as flexibility, timeliness, mutuality, and, in some cases, confidentiality. The proposed regulations could result in lost exports financed by the Export-Import Bank and foregone overseas investments supported by the Overseas Private Investment Corporation. The consequences would be reduced income and employment in the United States, decreased international competitiveness of U.S. business, and a worsened balance of payments. AID projects could be delayed or made more expensive. This would involve costs to the U.S. taxpayer and also to the needy persons in developing countries who are the beneficiaries of AID projects. The harmful impact on beneficiaries would be magnified if delay in the U.S. portion of a multilateral project caused the entire, larger project to be postponed. Finally, the proposed regulations could create serious difficulty for the State Department in the negotiation of international agreements. It is essential that the Department retain the flexibility to negotiate successfully

issues which may be of great political importance, especially in situations in which time is of the essence.

It is for reasons such as the above that the Department of State is strongly opposed to the proposed regulations in their present form. However, as we have said many times before, the Department remains committed to the furtherance of U.S. international wildlife conservation goals in a manner consistent with overall U.S. foreign policy interests. Section 8 of the Endangered Species Act, in particular Section 8(c), gives broad authority to the Interior Department to cooperate with foreign countries in conservation programs, through or in consultation with the Secretary of State. We believe that such a cooperative approach is consistent with the intent of Congress and can be carried out in a manner which is fully compatible with overall U.S. foreign policy interests. Further, we believe such an approach would be more effective in furthering the objectives of the Act than the approach you envisage under Section 7, because the Section 8 approach would encourage country-wide consideration of endangered species problems, whereas the Section 7 approach would be project-specific and limited only to actions involving U.S. Federal agencies. We would encourage Interior to expand its activities under Section 8, and we will be pleased to facilitate such a cooperative approach.

However, to reiterate, the Department of State strongly believes that the proposed regulations must be redrafted to make clear that they do not apply to Federal agency actions having effects on the high seas or in foreign countries. I urge your Department to act accordingly.

Sincerely,

/s/ [Illegible Signature]

for JAMES L. MALONE
Designate

Attachment:
As stated.

EXPORT-IMPORT BANK OF
THE UNITED STATES
Washington, D.C. 20571

OFFICE OF THE GENERAL COUNSEL

April 22, 1981

G. Ray Arnett
Assistant Secretary-Designate
for Fish and Wildlife and Parks
U.S. Department of the Interior
Washington, D.C. 20240

Dear Mr. Arnett:

This is in response to the memorandum from Dr. F. Eugene Hester, Acting Director, Fish and Wildlife Service, dated February 24, 1981, requesting the comments of Federal agencies on revised draft proposed regulations governing interagency consultations pursuant to Section 7 of the Endangered Species Act of 1973, as amended (the "Act").

We have limited our comments to the extraterritorial application of Section 7 of the Act by the draft regulations. Based on our review of the plain language of Section 7 as well as the legislative history of the Act, we have concluded that Section 7 does not apply extra-territorially to protect foreign endangered or threatened species from actions by Federal agencies. Furthermore, to the extent that the draft regulations are applied extraterritorially, they are invalid and should be amended accordingly. The Bank, along with the Department of State, has consistently maintained this position since the time that Section 7 regulations were first promulgated.

Our conclusion is based on the fundamental and long-standing rule of statutory construction that a statute is presumed to apply only within the United States unless a clear expression of Congressional intent is expressed to the contrary. Applying this rule to Section 7, it is apparent that not only is any clear expression of extraterritorial application absent, but also other sections of the Act clearly state a Congressional intention to promote bilateral and multilateral approaches to protect endangered or threatened species on a global level.

As a practical matter, the application of Section 7 extraterritorially would have a significant adverse impact on the ability of the Bank to meet its statutory objective of facilitating U.S. exports by providing financing to foreign purchasers of U.S. goods and services. In a world where competition among suppliers has become extraordinarily intense and financing is frequently the decisive factor in determining an export sale, Eximbank must be able to act as expeditiously as possible in determining whether to make its financial assistance available. Implementation of the draft regulations would necessitate long delays by the Bank in reviewing applications for financing with the net result being a loss of sales by U.S. exporters without any concomitant benefit of protecting foreign endangered or threatened species.

Moreover, the unilateral imposition of U.S. standards by the Bank would be perceived by foreign nations as an infringement of their national sovereignty, while at the same time calling into question the reliability of the United States as a supplier of much needed goods and services. Congress clearly expressed its awareness of this possibility by limiting U.S. efforts to protect foreign species to bilateral and multilateral approaches which encourage international cooperation.

Finally, the extraterritorial effect of the draft regulations runs counter to the important Administration objective, as stated in Executive Order 12291, of minimizing regulatory burdens on the economy of the United States. The draft regulations would also constitute a major rule under Executive Order 12291, since they are likely to result in a significant adverse effect on the ability of U.S. companies to compete in export markets and since their annual effect on the U.S. economy based on lost export sales is likely to be in excess of 100 million dollars.

We suggest that the draft regulations be considered further within the Administration, in order to determine how best to revise the regulations in a manner consistent with our comments.

Sincerely,

/s/ Warren W. Glick

WARREN W. GLICK
General Counsel

UNITED STATES INTERNATIONAL DEVELOPMENT
COOPERATION AGENCY
AGENCY FOR INTERNATIONAL DEVELOPMENT
Washington, D.C. 20523

ASSISTANT ADMINISTRATOR

April 23, 1981

Mr. G. Ray Arnett
Assistant Secretary Designate
for Fish and Wildlife and Parks
Department of the Interior
Washington, D.C. 20240

Dear Mr. Arnett:

In a letter dated February 24, 1981 from Dr. F. Eugene Hester, Acting Director of the Fish and Wildlife Service (FWS), the Agency for International Development (AID) was given the opportunity to comment on draft regulations recently proposed by FWS and the National Marine Fisheries Service. These Draft proposed regulations purport to amend the existing regulations regarding section 7 of the Endangered Species Act (ESA) to conform to the 1978 and 1979 amendments to that section.

On prior occasions involving the issue of the applicability of section 7 to the assistance activities financed by this Agency in less developed countries, we have expressed the view, in concurrence with the Department of State, that section 7 was not intended to have such extraterritorial effect. Copies of the letters containing the most recent statements of these views and those of the Department of State are enclosed. (TAB A). We continue to adhere to the views expressed therein.

We believe that the Draft proposed regulations, to the extent they are made applicable to foreign assistance activities in less developed countries, ignore the sensitive foreign policy considerations that are involved. The countries in which AID-financed development activities occur have their own priorities and values and seek to make their own choices regarding particular programs and their effects. No foreign assistance program could be effectively conducted that is prevented, by these regulations, from affording to the assisted countries' own national interests the careful consideration they deserve. In the absence of an unequivocal mandate from the Congress, we do not consider that the Draft proposed regulations can properly regulate the protection of endangered or threatened species in foreign countries in connection with assistance activities carried out at their request. In addition, we feel that the Draft proposed regulations would create significant additional administrative burdens and related costs and would cause unacceptable delays in the conduct of foreign assistance activities.

Although we do not believe that section 7 of the ESA applies to AID's overseas activities, we are, nevertheless, concerned about the plight of endangered or threatened species and their critical habitats in foreign countries. Our concern is expressed in AID's environmental regulations, which were amended on October 9, 1980, to include a separate section addressing this issue. Pursuant to this new section, a specific determination is made as to whether a proposed project, program or activity will effect endangered or threatened species or critical habitat. Whenever it is determined that such adverse effects will occur, an Environmental Assessment or EIS is completed that involves a discussion of the alternatives or modifications necessary to avoid or mitigate the adverse effects. The AID regulations permit full deference to be accorded to the views

of the developing country while also assuring the avoidance or mitigation of harm. AID routinely includes information available through FWS on endangered species in the environmental profiles of AID-assisted countries. These profiles become the basis for more in-depth studies of environment/natural resource issues. These latter studies are conducted with host country personnel.

In short, we do not believe that the requirements of section 7 apply to our overseas activities. However, our procedures are designed to protect endangered or threatened species and their critical habitat, with due attention to applicable foreign policy constraints. We therefore strongly urge that the Draft proposed regulations be redrafted to clarify that they are not applicable to federal agency activities having effects on the high seas or in foreign countries.

Sincerely yours,

/s/ Charles Paolillo

CHARLES PAOLILLO
Acting Assistant Administrator
for Program and Policy

UNITED STATES
NUCLEAR REGULATORY COMMISSION
Washington, D.C. 20555

Apr. 24, 1981

Mr. Eugene Hester, Acting Director
Office of Endangered Species
U.S. Fish and Wildlife Service
Washington, D.C. 20240

Dear Mr. Hester:

Subject: FWSIOES

We have reviewed the Section 7 revised draft proposed regulations which you sent us on February 24, 1981. Our comments are provided in the enclosure.

Sincerely,

/s/ Wm. H. Regan, Jr.

for DANIEL R. MULLER, Assistant
Director for Environmental
Technology
Division of Engineering
Office of Nuclear Reactor
Regulation

Enclosure:
Comments

THE NUCLEAR REGULATORY COMMISSION'S COMMENTS ON FWS AND NMFS PROPOSED SECTION 7 REGULATION DATED FEBRUARY 24, 1981

1. "A biological assessment may require a federal agency to conduct research or point out the need for research." (p. 8)

We have problems with this statement as presently worded. First, the assessment imposes no requirement; only the statute imposes requirements. Second, the requirement imposed by the statute is to "use the best scientific and commercial data available". While the assessment must be designed to identify species likely to be affected, the law does not contemplate that agencies carry out comprehensive research programs or detailed field studies in order to discharge their biological assessment obligations.

2. The terms "biological assessments", "construction" and "designated non-Federal representative". (p. 8)

These terms should be defined, or at least explained in the preamble.

3. The middle paragraph of p. 9.

The NRC retains responsibility over nuclear power plants and uranium mills for their lifetime (30+ years). During this time, modifications are made which are neither "major actions nor do they significantly affeet the human environment". The Service normally lists species occurrence simply by States.

In order for an agency to expeditiously comply with this regulation, we recommend that the Service supply additional information besides the state(s) in which the species occurs, e.g. counties in which the species occurs, and the species' usual or preferred habitat.

4. S. 402.02 Definitions (p. 26)

We question the premise that the Endangered Species Act applies to agency licensing actions involving exports to foreign countries. Even if there are some agency actions to which the Endangered Species Act applies, the broad assertion that the law extends to all U.S. governmental activities in foreign countries (if that is the meaning of the definition of "action" in 402.02) is incorrect. At least insofar as exports under the Atomic Energy Act of 1954, as amended, and the Nuclear Non-Proliferation Act of 1978, are concerned, the Endangered Species Act must be deemed not to have extraterritorial application.

UNITED STATES DEPARTMENT OF COMMERCE
INTERNATIONAL TRADE ADMINISTRATION
Washington, D.C. 20230

April 29, 1981

Mr. G. Ray Arnett
Assistant Secretary-Designate
for Fish and Wildlife and Parks
U.S. Department of the Interior
Washington, D.C. 20240

Dear Mr. Arnett:

This is in response to the memorandum of February 24, 1981 from Dr. F. Eugene Hester, Acting Director, Fish and Wildlife Service, requesting views from Federal agencies on revised draft proposed regulations which amend Section 7 of the Endangered Species Act of 1973, as amended.

After careful review of the draft regulations, I wish to advise you that the International Trade Administration opposes the amendments to Section 7 which govern the consultation process. We are particularly concerned with the extra-territorial application of consultative procedures to the actions of Federal agencies because it would have a serious adverse impact on Department of Commerce efforts to promote exports overseas and impede the competitive viability of U.S. companies. Furthermore, there is no apparent statutory or legislative basis for this extension beyond U.S. limits.

As we understand it, the consultative procedure would be very costly and time consuming. The timeliness, flexibility, and confidentiality so important in business dealings could be seriously undermined.

We also believe that the proposed amendments to the Act constitute a "major rule" under Executive Order 12291 of February 17, 1981 since they could result in a significant adverse effect on competition, employment, investment, and the ability of U.S. firms to compete overseas. On this basis we request that a regulatory impact analysis be prepared.

We suggest that the draft regulations be revised to incorporate the information obtained from the regulatory impact analysis as well as the responses of all concerned Federal agencies.

Sincerely,

/s/ Franklin J. Vargo

FRANKLIN J. VARGO,
Acting Assistant Secretary for
International Economic Policy

COMMENTS OF THE US ARMY CORPS OF ENGINEERS (CIVIL WORKS) ON THE DRAFT PROPOSED REGULATIONS ON INTERAGENCY COOPERATION, ENDANGERED SPECIES ACT

GENERAL COMMENTS

1. The U.S. Army Corps of Engineers (Civil Works) understands and supports the various important responsibilities which the many sections of the Endangered Species Act of 1973, as amended, give to the Departments of the Interior and Commerce, and specifically to the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS). Nevertheless, *Section 7* of that Act, as amended, grants limited and precisely–defined authorities to the Interior and Commerce Departments. To summarize, Section 7 authorizes the Secretary of the Interior or Commerce, as appropriate, *to consult* with other Federal agencies; otherwise to *assist* said agencies to carryout *those other Federal agencies'* responsibilities to implement the substantive mandates of Section 7; to designate critical habitat for endangered and threatened species; and to prepare "biological opinions" when appropriate. The plain language of Section 7 clearly directs that Section's substantive commands to each and every Federal agency, as follows:

> "*Each Federal agency shall,* in *consultation* with and with the *assistance* of the Secretary, *insure* that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of (critical) habitat . . ."

2. The Departments of the Interior and Commerce themselves have recognized that Section 7 vests in Federal

"action agencies" the primary responsibility for implementing Section 7's substantive commands. For example, the presently-effective version of the Interior/Commerce regulation on interagency cooperation states that:

> "Responsibilities after consultation. Upon receipt and consideration of the biological opinion and recommendations of the Service, it is the responsibility of the Federal agency to determine whether to proceed with the activity or program as planned in light of its Section 7 obligations." (50 CFR Sec. 402.04 (g))

The U.S. Circuit Court of Appeals for the Eighth Circuit stated the same conclusion in *Sierra Club v. Froehlke*, 534 F. 2d 1289 (8th Cir., 1976) as follows:

> "The plaintiffs urge a violation of Section 7, *supra*, requiring that all federal agencies act 'in consultation with and with the assistance' of the Secretary of the Interior on the ground that defendants have ignored

* * * * *

27. *Page 26, Section 402.02.*

a. The proposed definitions of "action" would continue an unsubstantiated and not-legally-authorized assertion which now appears in 50 CFR Section 402.01: i.e., that Section 7 restricts the activities of Federal agencies within the territorial jurisdiction of foreign countries. The Memorandum Opinion of the Assistant Solicitor for Fish and Wildlife, Office of the Solicitor, U.S. Department of the Interior, dated February 13, 1976, presents much of the evidence (e.g., from legislative history) which indicates that Congress did not intend Section 7 to apply to the territory of foreign nations. Even though that Solicitor's opinion concludes that Interior and Commerce should not attempt to designate critical habitat in foreign states, the evidence presented in the opinion demonstrates that the entirety of Section 7 applies to United States territory, not to foreign countries. By analogy, the holding and reasoning of the U.S. Circuit Court of Appeals for the Fifth Circuit in *U.S. v. Mitchell* (553 F. 2d 966, 5th Cir. 1977) supports the conclusion that no part of Section 7 applies to the activities of the United States Government agencies on the lands or territorial seas of foreign sovereignties. An overseas mission of the U.S. Army Corps of Engineers provides a case example demonstrating why the terms of Section 7 should not be stretched to control U.S. Government activities in foreign nations. The Corps of Engineers serves as the contracting/engineering/construction agent for large-scale "nation-building" programs in Saudi Arabia thereby serving U.S. diplomatic and economic interests. If the Saudi Government chooses to build a facility on a given site, the Corps could not reasonably or appropriately interfere with that decision because some endangered species might be disturbed (unless, of course, the Saudi Government were to instruct the Corps to protect

the species). In addition, U.S. national defense activities abroad could be seriously hampered if U.S. agencies must act to protect endangered species for which the host foreign government has no concern or regard.

b. The proposed definition of "jeopardize the continued existence of" contains a number of ambiguities. More importantly, that expression is used in Section 7's language addressed to all Federal agencies; consequently, the Departments of Interior and Commerce should not attempt to establish their definition in a regulation controlling all other Federal agencies. For example, the proposed definition of "jeopardize the continued existence of" would have the effect of forbidding any Federal action which "would be expected directly or indirectly to reduce appreciably the likelihood of the . . . *recovery* of listed species in the wild . . ." (emphasis added). "Recovery" is defined to mean "improvement in the status of listed species to the point at which listing is no longer required." These definitions could be construed to set aside vast areas of lands and waters not currently used by a species (e.g., the grizzly bear in the lower 48 states), and not likely to be used by that species in the near future, but which *could* be used by the species for "recovery" at some time in the most distant future. We are not convinced that the Act requires that Federal actions and permits be precluded for the large areas of real estate which could be affected by such an interpretation.

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

Aug. 31, 1981

Memorandum

To: Assistant Secretary, Fish and Wildlife and Parks

From: Associate Solicitor, Conservation and Wildlife

Subject: Overseas Application of Section 7 of the Endangered Species Act

This memorandum is in response to your request to determine whether Section 7 of the Endangered Species Act (Act or ESA) has international application.

Introduction

Section 7 of the Endangered Species Act of 1973, as amended, 16 U.S.C. § 1536, provides in pertinent part:

> Each federal agency shall, in consultation with and with the assistance of the Secretary insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each

> agency shall use the best scientific and commercial data available.

ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2).

The prohibitions of Section 7 can be divided into two separate parts: the "jeopardy" clause and the "critical habitat" clause. In past opinions and regulations of the Department of the Interior these two clauses have been interpreted in the following manner. The jeopardy clause has been applied to all federal agency actions including those occurring on the high seas and in foreign countries, as well as those within the United States.[1] Whereas, because the critical habitat clause specifically requires "consultation with the affected states," it has been interpreted as not applying to foreign countries.[2]

In view of this dichotomy in interpreting the two clauses, the regulation presently implementing the jeopardy clause reads, in pertinent part:

> Section 7 (16 U.S.C. 1536) applies to all listed species of fish, wildlife, or plants. . . . [I]t requires every Federal agency to insure that its activities or programs in the United States, *upon the high seas, and in foreign countries,* will not jeopardize the continued existence of a listed species. . . .

50 C.F.R. § 402.01 (emphasis added).

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[1] Memorandum on Federal Activities Jeopardizing Foreign Species from Associate Solicitor, Conservation and Wildlife to Director, Fish and Wildlife Service (April 12, 1977).

[2] Memorandum on Designating Critical Habitat for Foreign Species from Assistant Solicitor, Fish and Wildlife to Associate Director, Federal Assistance, Fish and Wildlife Service (February 13, 1976). The United States District Court for the District of Colorado, however recently held that the Act does require designation of critical habitat in foreign countries. *Colorado River Water Conservation District v. Andrus,* Civil No. 78-A-1191 (August 3, 1981). This is contrary to the traditional position of this Department. The judgment is not final in the case, but the Department intends to appeal this holding when it is.

The controversy surrounding this regulation and its interpretation of the responsibilities under the jeopardy clause involves the emphasized language extending the reach of the statute to foreign countries and the high seas.

Conclusion

Upon re-examining the relevant arguments on the major issues in this matter, we now conclude that the jeopardy clause of Section 7 does not apply to federal actions which occur within a foreign country. For jurisdictional reasons discussed later in this opinion, we take no position on whether Section 7 applies to the high seas. We do conclude, however, that Section 7 does apply to federal agency actions on the Outer Continental Shelf. All previous legal opinions of this Department which reached a contrary conclusion are hereby withdrawn.

Discussion

Section 7 requires, among other things, that all federal agencies insure that their actions will not jeopardize the continued existence of endangered or threatened species. In order to achieve this objective, the Act requires consultation between the Secretary of the Interior and the agency whose actions may affect an endangered or threatened species.

The consultation process involves three steps. First, the agency determines whether its proposed action "may affect" a protected species. If it may, consultation between FWS, and the agency must be initiated.

After discussion and review, the FWS issues a written statement to the Federal agency concerned, setting forth the Service's biological opinion on whether the proposed action is or is not likely to jeopardize the continued existence of the species. If the decision is that there is no like-

lihood of jeopardy, then the Agency's consultation requirement has been completed. If, however, the Service concludes that the proposed action is likely to jeopardize the species, the Service is to suggest reasonable and prudent alternatives which it believes would not jeopardize the species and could be taken by the federal agency.

Federal Actions in Foreign Countries

We conclude that the Section 7 consultation process does not apply to federal agency actions in foreign countries. In support of our conclusion, we look first to the express language of the statute and the general rules of statutory construction. Although the jeopardy clause itself did not originally contain and was not amended in 1978 and 1979 to include an express reference to "affected states," as is contained in the critical habitat clause, other amendments to Section 7 do support the conclusion that the jeopardy clause does not apply to federal agency actions in foreign countries. These amendments address primarily the exemption process whereby an agency action may be approved even though it would jeopardize a protected species. Since this exemption process fails to expressly reflect the possibility that an exemption may be necessary for a federal action in a foreign country, it supports the proposition that the jeopardy clause was not intended to apply to federal actions in foreign countries.

In addition to the express language of the statute, the legislative history of the 1978 and 1979 amendments establishing the exemption process indicates that Congress was focusing on the effect federal agency actions would have within areas under the jurisdiction of the United States. For example, the Conference Report on the 1978 amendments states:

> Under the new Section 7, a Federal agency, the Governor of a state where the agency actions, species,

> and critical habitat are located, or an individual seeking a permit or license, may submit to the Secretary an application for an exemption. . . . Upon receipt of the application, the Secretary must promptly notify the Governor or Governors of any affected State(s) and submit the application of the review board.
>
> The review board will consist of three members: one appointed by the Secretary, one appointed by the President after consideration of the recommendations from the Governor(s), of the affected State(s), and an administrative law judge.

H.R. Rep. No. 1804, 95th Cong., 2d Sess. 19 (1978).

After making their initial determination, the review board submits their report to the Endangered Species Committee, as established in section (7)(e), 16 U.S.C. § 1536(e). The Committee is composed of the following seven members: the Secretaries of the Interior, Army, and Agriculture; the Administrators of NOAA and EPA; the Chairman of the Council of Economic Advisers; and a person appointed by the President upon recommendation of the Governor(s) of the affected State(s). Originally, the Senate bill included the Governor of the State on the panel, but at conference the House's version was adopted allowing for appointment of a representative of the Governor.

The reasons for the inclusion of a State representative was explained in the Senate Report as follows:

> [T]here was a perceived need to have someone on the Endangered Species Committee who is in touch with and understands the needs and desires of those persons close to or dependent on the Federal activities which would be the subject of the exemption application.

S. Rep. No. 874, 95th Cong., 2d Sess. 5 (1978).

This language clearly reflects Congressional sentivity for soliciting the views and opinions of the Chief Executives of the States to be affected by the impact of Section 7 on a given project. If Congress was so solicitous of the jurisdictional prerogatives of the governors of this nation, it should not be presumed that it was any less sensitive to the sovereign prerogatives of the rulers of foreign countries. That is, if Congress intended to require that Section 7 be applied to federal actions in foreign countries, it would have inserted some provision allowing for the Secretary of State[3] or representatives of the affected foreign countries to be on these panels. Instead, membership on both the review board and Endangered Species Committee is domestically-oriented.

Furthermore, in those sections of the ESA which were clearly intended to apply to foreign countries, Congress either expressly required consideration of the programs and policies of the affected foreign nations or mandated the involvement of the Secretary of State. See 16 U.S.C. 1533(b)(2) and 16 U.S.C. § 1538.

While recognizing the inherent risks associated with determining Congressional intent through Congressional silence, any ambiguity on the issue of the application of Section 7 to foreign countries is resolved upon the consideration of various foreign policy concerns.

First of all, the consultation procedures under Section 7 would undoubtedly cause significant delays in administer-

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[3] Section 7(i), 16 U.S.C. § 1536(i) provides a procedure whereby the Secretary of State may prohibit the consideration of an application for an exemption if such exemption and proposed action would be in violation of an international treaty obligation or other international obligation of the United States. We do not believe that this indicates an intent to apply Section 7 to federal agency actions in foreign countries. Rather, this provision is triggered whenever a federal agency action within the United States involves international treaty obligations.

ing assistance activities in foreign countries and would severely hamper the flexibility and responsiveness of American diplomacy abroad. Nor could the consultation process insure confidentiality which is often a prerequisite to foreign policy initiatives, intelligence operations or military assistance.

There is also the problem of foreign sovereignty considerations. The consultation and exemption process does not establish procedures for considering and deferring to the views of foreign governments with respect to their own development priorities, or plans for fish and wildlife conservation in their own countries.

For all of the above reasons, therefore, we conclude that the jeopardy prohibition under Section 7 does not apply to federal agency activities within foreign countries.

Federal Agency Actions on the High Seas Beyond the Outer Continental Shelf

Under the division of jurisdiction set forth in the Endangered Species Act, 10 U.S.C. § 1532(10),[4] the Department of Commerce has the primary responsibility for the conservation of marine species which live upon the high seas beyond the Outer Continental Shelf (OCS). Thus, if

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[4] Pursuant to the Reorganization Plan No. 4 of 1970, 5 U.S.C. app. (1976), the Director of the U S. Fish and Wildlife Service and the Director of the National Marine Fisheries Service, signed a Memorandum of Understanding which divided jurisdictional responsibilities under the Endangered Species Act. *See* Memorandum of Understanding Between the U.S. Fish and Wildlife Service, United States Department of the Interior and the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, United States Department of Commerce Regarding Jurisdictional Responsibilities and Listing Procedures Under the Endangered Species Act of 1973 (signed August 28, 1974 by Robert W. Schoning, Director, NMFS and Lynn A. Greenwalt, Director, FWS).

Section 7 has any application at all on the high seas, federal agencies would consult with the Department of Commerce and not the Department of the Interior. We, therefore, have no need to decide whether Section 7 applies to federal agency actions on the high seas beyond the OCS.

Federal Agency Actions on the Outer Continental Shelf

Section 4(a)(1) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(1), generally extends the laws of the United States to the OCS. One such law is the Endangered Species Act. Thus Section 7 applies to federal agency actions on the OCS.

Unlike the situation involving federal agency actions on the high seas beyond the OCS, agency actions on the OCS could impact listed species under the jurisdiction of the Department of the Interior. For example, in the case of OCS Lease Sale #53, BLM consulted with the Fish and Wildlife Service over the potential impact of the sale on the California Sea Otter.

The application of Section 7 to Federal agency activities on the OCS has also been the subject of recent litigation involving oil and gas leasing activities. *See Conservation Law Foundation v. Andrus,* 623 F. 2d 712 (1st Cir. 1979); *North Slope Borough v. Andrus,* 486 F. Supp. 332 (D.D.C.), *aff'd in part,* and *rev'd in part,* 642 F. 2d 589 (D.C. Cir. 1980); *State of California, et al. v. Watt, et al.* No. 81-2080 NRP (C.D. Cal. Aug. 18, 1981). In these cases, the Government argued that it had complied with all of the procedural and substantive requirements of Section 7 as they related to various oil and gas leasing proposals.

We believe, therefore, that the application of Section 7 to federal actions on the OCS is well established.

/s/ J. Roy Spradley, Jr.
J. ROY SPRADLEY, JR.

cc: Director, USFWS
General Counsel, NOAH, Department of Commerce
Department of State, OES/ENR,
Attention: George Furness, Wildlife Officer

bcc: Solicitor Docket
Div Chron File (2)
SOL FW
SOL FW Files
SHORI/1b/8/28/81 x2172

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil No. 3-86-757 (MN)

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, AND THE HUMANE SOCIETY OF THE UNITED STATES, PLAINTIFFS

v.

DONALD P. HODEL, AS SECRETARY OF THE INTERIOR, DEFENDANTS

ALLEGATIONS BY PARAGRAPH NUMBER IN FIRST AMENDED COMPLAINT	ADMISSIONS IN ANSWER OF DEFENDANT SECRETARY
¶6. Defendant Hodel is Secretary of Department of Interior. He is charged with implementation of the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*	Defendant admits he is Secretary of Interior and that he is primarily responsible for implementation of the Endangered Species Act (ESA) with regard to those species under the jurisdiction of the Department of Interior.
¶10. In addition, there are both endangered and threatened species with ranges that span United States and foreign borders.	As of November 1, 1988, 1035 species were listed as endangered or threatened, including 576 species that range outside the United States.

ALLEGATIONS BY PARAGRAPH NUMBER IN FIRST AMENDED COMPLAINT	ADMISSIONS IN ANSWER OF DEFENDANT SECRETARY
¶11. The Secretary has listed and continues to list species whose primary range is outside the United States.	Defendant admits that species whose primary range is outside the United States have been and will be listed as appropriate pursuant to the requirements of Section 4 of the ESA.
¶16. Shortly after passage of the Act in 1973, a series of consultations within the Department of Interior and among Interior and other Federal departments and agencies began. The purpose of these discussions was to outline the requirements Section 7 imposed on Federal agencies and departments.	Defendant admits there were discussions among the various agencies concerning the requirements of the ESA.
¶17. The Fish and Wildlife Service (FWS) was designated the lead agency within the Department of Interior for formulating regulations to implement Section 7.	Defendant admits the Fish and Wildlife Service (FWS) was designated the lead agency for the formulation of regulations concerning section 7 of the ESA.

ALLEGATIONS BY PARAGRAPH NUMBER IN FIRST AMENDED COMPLAINT	ADMISSIONS IN ANSWER OF DEFENDANT SECRETARY
¶18. On April 22, 1976, "Guidelines to Assist the Federal Agencies in complying with Section 7 of the Endangered Species Act of 1973" were transmitted to all Federal agencies by the Fish and Wildlife Service. After revision of these Guidelines based on Federal agency comments, the FWS issued a Notice of Proposed Rulemaking on January 26, 1977. 42 Fed. Reg. 4868 (1977).	Admits
¶21. The proposed rules received extensive comment and led to final rulemaking on January 4, 1978. 43 Fed. Reg. 870 (1978) (the 1978 rule).	Admits
¶22. The final rulemaking retained in full the provision of the proposed rule applying Section 7 requirements	Admits

ALLEGATIONS BY PARAGRAPH NUMBER IN FIRST AMENDED COMPLAINT		ADMISSIONS IN ANSWER OF DEFENDANT SECRETARY
	to Federal agency actions occurring in foreign countries. 50 C.F.R. § 402.02, 43 Fed. Reg. at 874 (1978).	
¶23.	Congress in 1978 amended the Act, Nov. 10, 1978, P.L. 95-632, § 3, 92 Stat. 3752. In so doing Section 7 was lengthened considerably.	Admits
¶24.	On June 29, 1983, the Fish and Wildlife Service published a Notice of Proposed Rulemaking to revise 50 C.F.R. Part 402. 48 Fed. Reg. 29990 (1983).	Admits
¶26.	The effect of these proposed changes was to deny to species listed by the Fish and Wildlife Service pursuant to Section 4 of the Act whose primary range is outside the United States the protection those species	Admitted through lack of response pursuant to Fed. R. Civ. P. 8(d).

ALLEGATIONS BY PARAGRAPH NUMBER IN FIRST AMENDED COMPLAINT	ADMISSIONS IN ANSWER OF DEFENDANT SECRETARY
had received both under the 1978 rule and the Act.	
¶27. Several commenters, including Defenders of Wildlife, asserted that the rule should continue to apply to agency actions occurring in foreign countries. In addition, an Interagenc Task Force formed pursuant to the International Environment Protection Act of 1983, 22 USC § 2151q, cited Section 7(a)(2) of the Endangered Species Act in recommending that Federal agencies "should continue to adopt policies withholding support for certain types of projects that degrade or destroy fragile or protected lands" in foreign nations.	Admits

ALLEGATIONS BY PARAGRAPH NUMBER IN FIRST AMENDED COMPLAINT		ADMISSIONS IN ANSWER OF DEFENDANT SECRETARY
¶28.	On June 3, 1986, FWS published a final rule revising the 1978 rule. 50 C.F.R. Part 402, 51 Fed. Reg. 19926 (1986) (the 1986 rule).	Admits
¶29	In response to the comments on the proposed rule, FWS retained that portion of the 1978 rule applying Section 7 to Federal agency actions on the high seas. The 1986 rule rescinded that portion of the 1978 rule which applied the consultation requirements of Section 7 to Federal agency actions in foreign nations. The definition of "action" in the 1986 rule likewise purported to limit the applicability of Section 7's consultation requirement to agency actions occuring in the United States or on the high seas.	Admits

ALLEGATIONS BY PARAGRAPH NUMBER IN FIRST AMENDED COMPLAINT	ADMISSIONS IN ANSWER OF DEFENDANT SECRETARY
¶31. FWS will continue to list species whose primary range is found outside of United States jurisdiction when those species are determined to be endangered or threatened pursuant to Section 4 of the Act.	Admits
¶36. Issuance of the aforesaid 1986 rule, 50 C.F.R. Part 402, 51 Fed. Reg. 19926 (1986), constitutes a final agency action.	Defendant admits that the rule announced at 51 Fed. Reg. 19926 (June 3, 1986) is a final agency action.

DEPOSITION TESTIMONY OF JUDY M. BELLAIRS

December 14, 1988

Testimony Regarding Deponent's Personal and Professional Interest In Endangered Species Conservation

Questioned by Mr. Shockey:

Q. Why don't you go ahead and state what your current job is and what your job responsibilities include.

A. I'm currently the legislative director of the Minnesota Chapter of the Sierra Club. My duties include lobbying and development of legislative issues for the Chapter.

Q. And how long have you held that position with the Minnesota Chapter of the Sierra Club?

A. I have been legislative director for about a year.

Q. Before that where did you work?

A. I had a previous position with the Sierra Club as more or less an office manager.

Q. For how long?

A. That was the previous six months to my becoming legislative director.

Q. Were you previously employed by an organization known as Friends of Animals and Their Environment?

A. I was a volunteer.

Q. What was your position as a volunteer with that organization?

A. I was one of the issues coordinators.

Q. And what are the responsibilities for that position?

A. To research and develop issues, wildlife issues.

Tr. at 5-6.

Q. In connection with your volunteer work for FATE, did any of that work relate to endangered and threatened species life?

A. Yes.

Q. Does that organization concern itself with wildlife generally or only more specifically with endangered and threatened species?

A. With all types of wildlife including endangered species . . . .

Q. And when did you begin your volunteer work for FATE?

A Probably 1984 or '85.

Tr. at 10-11.

Q. Is that the express purpose of [FATE], to protect endangered and threatened species?

A. Well, I know for a fact they have worked on protection of endangered and threatened species.

Tr. at 19.

Testimony Regarding The Efficacy Of The Section 7 Consultation Process

Questioned by Mr. Shockey:

Q. Do you know if the Endangered Species Act refers to actions in other nations that involve an agency of the federal government?

A. My understanding is that the consultation requirement does refer to agency action.

Tr. at 17.

Q. You stated a couple moments ago that you believe there could be some [e]ffect on your enjoyment of endangered species in the Minnesota Zoo as a result of the Secretary's regulation. What do you think that [e]ffect could be?

A. Failure to consult might deplete populations of threatened and endangered species thereby making them more difficult to obtain for zoos.

Q. If consultation ocurred, could the Secretary prohibit that project in another country from going ahead?

A. My understanding is that he could not prevent it; however, I believe the consultation process is important because it makes information available.

Tr. at 25-26.

Testimony Regarding Deponent's Familiarity With This Action

Questioned by Mr. Shockey:

Q. Do you have an understanding of the nature of this lawsuit involving consultation and the Endangered Species Act?

A. I have a general understanding.

Q. What is that understanding?

A. That Section 7 of the Endangered Species Act requires agencies to consult with the Fish and Wildlife Service on projects in foreign countries that may impact on threatened and endangered species.

Q. And was that understanding derived from your own review of documents or some other source of information?

A. I don't specifically recall reviewing documents. When the lawsuit was initiated and I did my affidavit, I learned of the subject of the lawsuit.

Tr. at 8-9.

3020L

DEPOSITION TESTIMONY OF JOHN M. FITZGERALD

December 19, 1988

Testimony Regarding Deponent's Personal and Professional Interest In Endangered Species Conservation

Questioned by Ms. Kolker:

Q. Has anything in that first three paragraphs changed? Are you still a member of Defenders of Wildlife?

A. I am. My title has changed.

Q. Your title is now?

A. Counsel for wildlife policy.

Q. And have your duties been changed substantially?

A. My duties expanded to include not only the endangered wildlife program, but be of assistance to the other programs and our issues campaigns.

Tr. at 6.

Q. When was the last time you went to the zoo?

A. About two or three months ago.

Q. Which zoo?

A. National zoo.

Q. Do you go there frequently?

A. Fairly frequently, yes.

Q. Which is defined as?

A. Probably about four or five times a year.

Q. Does the National Zoo have endangered species on exhibit?

A. Yes.

Q. Which species?

A. A whole list of them.

Q. Any in which you are particularly interested?

A. I believe they have both Asian and African elephants, the great apes, the golden lion tarmarin I believe is one of their favorite they are working on trying to restore

those to the wild, if I am not mistaken. Those come from Brazil. Tiger. You can go on and on. Many of the species in the zoo are endangered and threatened.

Q. In paragraph 5 of the affidavit you identified earlier, you said what you have enjoyed in zoos and on films, I am paraphrasing but the affidavit is part of the record, that will be harmed by U.S. agency actions described herein. Which agency actions were you referring to?

A. Okay. A lot of different agency actions, but, for example, if the Mahaweli project in Sri Lanka is completed, as I understand it is not yet completed, if it is, as it proceeds, it will almost undoubtedly have an impact, and will probably harm the Asian elephant population which is endangered there. The various dams in India, like the Normada River Valley project will harm Asian elephants. I think 35,000 square miles, a substantial amount of teak forest habitat that the Asian elephants live in and work in, will be flooded out by that project, which I believe will be funded by the U.S. Treasury Department through the World Bank. There have been a number of dams proposed in Thailand, covered in Defenders Magazine, which will harm the Asian elephant, again multi-lateral bank projects funded by U.S. agencies and approved by their votes.

Q. Do you understand the World Bank to be a Federal agency?...

A. The U.S. agency, Treasury Department, that is, has a tremendous influence on the World Bank and its projects, as they are developed and carried out.

Tr. at 20-22.

Testimony Regarding Deponent's Relevant Activities Since Affidavit Filed In November 1986

Questioned by Ms. Kolker:

Q. Have you personally traveled abroad this year?

A. Yes.

Q. To what countries?

A. Argentina—this is '88, isn't it?

Q. Yes.

A. Argentina.

Q. I gather, from your checking the year, you traveled in '87 as well?

A. Yes.

Q. To?

A. Canada...

Q. Were either of these trips related to your duties with the Defenders of Wildlife?

A. Yes. The '87 trip was to be Defenders' representative, official representative as on ongoing member organization to the Conference of the Parties to the Convention on International Trade in Endangered Species...

Q. And in 1988, in Argentina, was that related to your duties?

A. Related, yes. It wasn't required, but I chose to go there, but the wildlife gave me the opportunities which were fairly substantial. For example, I visited the habitat of the right whale in Peninsula Valdez in Argentina, one of the few places where they can sometimes be seen, near Peninsula Valdez...

Q. How long were you at the site near the Peninsula Valdez?

A. That particular site, for a day. The other side, another day. There were several different species I was in-

terested in...I also went ot Fosiguasu...in northern Argentina, which is a fairly tropical area, in hopes of seeing some of the endangered wildlife there. It's jungle life habitat. And that was three days there.

Q. Your next stop?

A. After Buenos Aires was the area near Peninsula Valdez.

Q. Did you visit other sites to see wildlife?

A. Yes, around that area there were two or three wildlife sites. One was the camping ground of the right whale. The others were actually—I don't think elephant seals are endangered, but we did see elephant seals and sea lions, and Magnellan's penguins and such. Then at the foot of the Andes, that was the third site...

Q. Are you aware of any development projects associated with any of these areas that you visited?

A. Well, there are a number of development projects in the rainforest in South America, but I am not aware of any specific projects affecting these specific areas. However, I am concerned if any were to come along, we would not have any way to protect the wildlife without the consultation process in place...

Q. Have you visited any U.S. funded elephant project that you are aware of?...

A. I just wanted to point out that as a staff member of Defenders, I am often told about people's or members' visits to places, and it is sort of my responsibility to keep those things in my mind as I carry out my duties in this job. So that's a part of my job, is to represent Defenders' members' interests when they visit these places, and tell me about them and say there is something going on, and we are concerned about it.

Tr. at 15-19.

Testimony Regarding The Efficacy Of The Section 7 Consultation Process

Questioned by Ms. Kolker:

Q. Do you know if the Secretary can prevent a project from going forward?...

A. The consultation itself is designed to provide enough information to determine whether or not the agency action, the action agency's action is likely to jeopardize, and if so, to provide alternatives, or, in fact, a simple jeopardy opinion which the action agency should then consider in determining whether to carry out the action, and in fact, in all practical matters, the action agency would not then carry out the project if it were found to jeopardize the species.

Tr. at 13.

Testimony Regarding Deponent's Familiarity With This Action

Questioned by Ms. Kolker:

Q. What is your understanding of this particular lawsuit?

A. My understanding is that it is brought in order to require the Secretary of Interior to in turn issue regulations which require that agencies when carrying our actions which may affect endangered, threatened species in other countries to consult with the Secretary of Interior to ensure those actions do not jeopardize those species.

Q. When did you first hear about the regulation which is challenged?

A. I was generally aware of the regulation, but the specific promulgation of that regulation was in June, I believe June 3rd, 1986. So in the way of becoming specifically aware of it, when it was promulgated, then I read the Federal Register within a few days or so thereafter.

Q. You were not involved with the regulation prior to it becoming final?

A. Defenders of Wildlife was involved in commenting on it...

Q. How were you approached about participating in this case?

A. How was I approached?

Q. Yes.

A. As Defenders of Wildlife's Washington representative for endangered wildlife, I was not approached.

Q. How did you come to produce and sign this affidavit?

A. I wrote it.

Q. And in response to what did you write it?

A. My concern that the Endangered Species Act was being violated.

Tr. at 6-9.

DEPOSITION TESTIMONY OF JOHN W. GRANDY

December 19, 1988

Testimony Regarding Deponent's Personal and Professional Interest In Endangered Species Conservation

Questioned by Ms. Kolker:

Q. Is that affidavit still correct as to your education and your current employment?

A. Yes, ma'am.

Q. Have your duties changed?

A. Not my duties at the Humane Society. I have been appointed to another advisory committee to the Secretary of Agriculture.

Q. The name of that committee is?

A. It's Predator Control Advisory Committee to advise on predator control in the United States.

Tr. at 6.

Q. In your affidavit at paragraph 10, if you will turn to it so that you will have it in front of you, you mention visiting Costa Rica in 1979.

A. Right.

Q. Did you visit Costa Rica in connection with your employment?

A. Right. I visited Costa Rica in connection with the CITES conference, that's a conference on the Convention on International Trade in Endangered Species, Wild Fauna and Flora, to which I was an official observer for the Humane Society of the United States. I think I should mention as well that that is a treaty which I have had a longstanding personal and professional interest in. I helped draft it in 1971, '72...

Q. While you were in Costa Rica did you visit any sites to view wildlife?

A. Yes...I visited a national park on the east coast of Costa Rica, the name of which is Cahuita. Indeed, I was just in Costa Rica about two weeks ago again, and I was in Costa Rica earlier this year visiting national parks and protected areas. The first trip this year was again a professional representation at a meeting of the International Union for the Conservation of Nature and Natural Resources. This past like mid-November my wife and I went on a week's vacation to look at national parks and protected areas.

Q. Let's get back to the '79 trips and take these in order. While you were in Costa Rica you visited national parks?

A. Yes...

Q. You mentioned in 1981 a visit to New Delhi. Was that also in connection with your employment?

A. That was also in connection with CITES.

Q. And while you were in India, did you take the occasion to visit wildlife areas?

A. Yes, ma'am.

Q. What areas did you visit?

A. Actually I got sick. I stayed pretty much right around New Delhi. I went down into Old Delhi and went out—I did a lot of bird watching, but I got pretty sick...

Q. Nepal, again in connection with your employment?

A. Well, half employment and half pleasure.

Q. And where did you visit in Nepal?

A. Principally two National Parks, Chitwan National Park, and then an adjacent area called Tiger Tops.

Q. Are you aware of any United States development projects located near either of those locations?

A. No. I am aware that there is—I pause there because I am aware that there are some adjacent development projects, including one specifically with endangered species there that I would be surprised if it wasn't U.S. funded, at least in part.

Q. Do you have any specific information that leads you to believe that it is U.S. funded?

A. Only that the Nepalese Government does receive, again, a fair amount of funding from the United States Government. One of the specific things that the United States is interested in is some animal-related projects, and the project to which I refer was one of those.

Q. Is that a project to recover endangered species, or protect them?

A. Market them.

Q. Market them?

A. Yes, ma'am. It's a crocodile breeding project.

Q. Next country listed in your affidavit was Botswana, 1983. Was that in connection with your employment?

A. Yes ma'am. The same, with respect to CITES.

Q. And while you were there, did you take the opportunity to view wildlife?

A. I did, yes, ma'am.

Q. Are you aware of any United States development projects in the area of Botswana?

A. I am aware, quite aware that there are a lot of projects that are Peace Corps projects...

Q. Finally you listed a visit to Buenos Aires in 1985, also CITES?

A. Yes.

Q. Did you view wildlife in Argentina?

A. Yes, ma'am.

Tr. at 13-18.

Q. You are referring to the Polonoroestre project?

A. That's correct and that project has resulted in the destruction of substantial rainforest and wildlife habitat.

Q. And you believe that is funded by the World Bank?

A. Yes, ma'am.

Q. Do you believe that the World Bank is a Federal agency?

A. No, ma'am. But it is—it receives a lot of money from the United States and members of the United States Government sit on that governing body board, as I understand it, as they do on other development banks.

Q. You in that same paragraph said you suffered personal and professional harm from agency actions in the above-mentioned countries, referring to Costa Rica, India, Botswana, and Buenos Aires. Can you tell me the basis for that belief?

A. I know that our Government through international development banks, including the World Bank, and through our own AID contribute to development in those countries. To the extent that that development is less sensitive to environmental and endangered species than it should be as a result of our failure to comply with Section 7 of the Endangered Species Act, I would suffer both personal and professional harm.

Tr. at 19-20.

Testimony Regarding Deponent's Relevant Activities Since Affidavit Filed In November 1986

Questioned by Ms. Kolker:

Q. In addition to the trips you mentioned in your affidavit that you have mentioned, since then have you taken other trips abroad in 1986, 1987 and 1988, the years since the affidavit?

A. Yes, ma'am.

Q. And to what countries? Let's take 1987 first.

A. I take a lot of trips. Well, the principal one of interest here that I recall is to Kenya. This year, that is 1988, I have been to Kenya twice, and that means I went once in 1987.

Q. You went once in 1988 and once in 1987?

A. Twice in '88, once in 1987, right.

Q. On the 1988 trips to Kenya, what areas did you visit?

A. We traveled throughout the country . . . I am telling you. We visited Nairobi, Nairobi National Park, Amboseli National Park, Samburu National Park, traveled extensively by road in parts of the country. Then we traveled to Mountain Tops which is connected with Aberdare National Park, Masai Mara, which is a national park that constitutes the northern edge of the Serengeti. I think I left one out . . .

Q. How long was that tour?

A. About two weeks.

Q. And you did this twice in 1988?

A. Yes, ma'am.

Q. While you were in Kenya did you visit any development project funded by the United States directly?

A. Good Lord. I am absolutely certain I did, but we contribute I mean we, the United States Government con-

tributes money to a lot of things in Kenya. But I went principally to look at endangered species, and to show those to our members, not to review development projects. Although I went through a lot of them, I don't know that I went to one specifically funded by the United States Government.

Q. Other than Kenya this year and the Costa Rica trip which we discussed earlier, have you made any other trips abroad?...

A. My trips to Canada have all been wildlife related. But not in a direct observational sense. I went to Canada to discuss the Convention on International Trade in Endangered Species and our relationships through it with our Canadian neighbors.

Q. The 1987 trip to Kenya was the same sort of leading a group for the Humane Society?

A. Yes, ma'am. . . .

Q. Are you planning within the next year or so, do you have any firm plans to visit any United States-funded development projects abroad?

A. I intend certainly to go back to Kenya and to Botswana during 1989. I will certainly look for development projects in Kenya this time, and if I see any, I will find out who funds them, and I will see if they belong to the United States, you can count on that. My trip to Botswana this year will involve some U.S.-sponsored activity connected with protection of elephants, and things of that kind. Again, if I am in Botswana, I will certainly review any projects I see.

Q. You have not identified any specific projects that you intend to visit, specific sites?

A. The only one that I intend to visit in Botswana is a large area called the Okabonga swamp and Okabonga Delta which is the subject of development plans jointly funded, as I understand it, through the World Bank and

the Inter-African Bank and the EEC, that is, the European Economic Community, which have to do with cattle grazing in that region. I intend to review that. I suppose the U.S. is certainly an indirect sponsor of that through the World Bank.

Tr. at 21-26.

Testimony Regarding The Efficacy Of The Section 7 Consultation Process.

Questioned by Ms. Kolker:

Q. Do you believe that the contribution of funds by the Department of the Treasury to the World Bank is an event which would trigger the consultation requirement under Section 7 of the Endangered Species Act?

A. Sure. Absolutely.

Q. What is the basis for that belief?

A. It seems to me that that is precisely the kind of expenditure that the Endangered Species Act must be involved in in order to be effective. We can't—these development projects cause severe ecological and environmental damage in Third World countries, and others, and that damage has the—the mechanism of having consultation provides a way to limit that damage by involvement of the experts at the Department of the Interior and throughout the world.

Tr. at 26.

Testimony Regarding Deponent's Familiarity With This Action

Questioned by Ms. Kolker:

Q. Do you know if the Secretary of Interior or the Secretary of Commerce can require an agency to enter into consultation?

A. Well, they – my understanding is they cannot force them to do it. They are required to do it by statute, and I would assume that they would comply with the law.

Q. What is the source of your belief that it is required by the statute?

A. My understanding of Section 7. I should say I had a fair amount to do with drafting the original Endangered Species Act back in the early seventies, and have had sort of a personal and professional interest in it for some time. My recollection is that was the way we constructed Section 7. It has since been modified, as we all know, in response to some serious political problems, but basically the force, and effect, and intent of it is certainly still the same.

Q. Do you know if the Secretary can prevent a project from going forward?

A. I don't think he can. I'm not a lawyer, as I have told you, but it's my understanding that he cannot. What we are trying to do, here again, my understanding, we are trying to get the best information into the hands of the decision-making agency so that they can understand all the facts that might allow them to limit any harm or jeopardy to an endangered or threatened species.

Q. What is your understanding of the purpose of this lawsuit?

A. To force Seciton 7 to be complied with respect to projects outside of the United States, that is, in other countries...

Q. Do you remember when you first became aware of the regulation?

A. No. I have been generally aware of Section 7 for a long time, and the controversy over regulations to enact it that would cause Section 7 to be implemented internationally. I don't remember exact dates. . .

Q. Did you write your affidavit?

A. Yes, ma'am.

Tr. at 9-12.

3028L

DEPOSITION TESTIMONY OF MAXINE E. McCLOSKEY

December 20, 1988

Testimony Regarding Deponent's Personal and Professional Interest In Endangered Species Conservation

Questioned by Ms. Kolker:

Q. You were a board member of Defenders?

A. Yes, I am still on the board. I am secretary of the board and member of the executive committee.

Tr. at 6.

Q. Are you currently involved in any, personally involved in any ongoing research activities?

A. Yes. I am preparing a paper on ocean wilderness that I will give next year at the Coastal Zone Symposium.

Q. And what is the scope of that paper?

A. Well, this paper will explore the extent to which the concept of wilderness, which is something we have always associated with land, the extent to which that concept can be applied to the ocean environment.

Q. What percentage of your time would you estimate you devote to research activities, the preparation of this paper?

A. About 25 percent at the moment.

Q. And what percentage of your time do you devote to Defenders of Wildlife activities?

A. About 40 percent.

Q. Are you active in other conservation groups?

A. Yes. I am the Washington representative for the Whale Center. This is a volunteer position. I also am the Chair of the History Committee for the Sierra Club, and I serve on the Sierra Club's Centennial Task Force to observe the hundredth birthday in 1992, and I am also a member of the Sierra Club's National Wildlife Committee.

Tr. at 7-8.

Q. Let's work backwards, how many trips abroad have you made this year?

A. One.

Q. To what country?

A. Costa Rica and to Peru.

Q. And in 1987?

A. We went to Africa, Kenya and Sudan.

Q. 1986?

A. None. Well let's see, in '87 I also went to England, but that did not involve any wildlife observations...Well, actually in 1987, my trip to England, I went to be an observer of the International Whaling Commission annual meeting. It did not involve any field work at all, but I have been to a large number of Whaling Commission meetings.

Q. 1985?

A. 1985, Argentina, Brazil, Paraguay, also went to Switzerland, Italy and France, also went to West Germany.

Q. In 1984?

A. Japan and Spain.

Q. I will do a couple more years back.

A. Okay. '83, Australia and Seychelles.

Q. Prior to '83, are there countries that you visited for wildlife observation?

A. Yes.

Q. Tell me the names?

A. In '82, it was Indonesia; '81 was New Zealand; '79, the Soviet Union, and also Costa Rica; in '78, Mexico; '77, Australia.

MR. O'NEILL:

Are these in addition to the affidavit, or do they include the ones in the affidavit?

THE WITNESS:

Many of these are in addition to the affidavit.

Questioned by Ms. Kolker:

Q. So this is an exhaustive list, as nearly as you can remember with your notes, of countries you visited for the purposes of observing wildlife?

A. Or on wildlife-related matters. I could give you a list of the years where I attended meetings of the International Whaling Commission. That would be '78, '79, '80, '81, '82, '83, '84, '85, and '87.

Q. Did those involve field work or simply meetings.

A. No, there was no field work connected with the meetings themselves. On some occassions it's like the one in '85, the meeting was held in Argentina, so there was field work then in connection with that. And the first one, '77, that was in Australia, and, yes, there was field work there...

Q. What was the primary purpose of those trips [to Indonesia]?

A. Well, we had two purposes. One was to—I was invited to present a paper at the IUCN—...International Union for the Conservation of Nature—at the IUCN's Conference on Parks. These conferences are held every ten years, and I was asked to give a paper on whale sanctuaries. So we went for that reason. Also as an opportunity to visit wildlife habitats, and try to see wildlife while we were there.

Tr. at 16-19.

Q. With respect to paragraph 10 of your affidavit, you state that "During the trip to Bali I learned about the ongoing U.S.-funded translocation projects..." Can you tell me how you learned of those projects?

A. Well, actually I knew about the projects before we left, because my reading list is wide, and I read about many things. So when we were there, we made further inquiries about this from people, Indonesians, and wildlife conservationists who were there about what was actually happening...

Q. Do you believe these projects were directly funded by the U.S.?

A. Yes.

Q. Which agencies?

A. I believe it was U.S. AID.

Q. Can you describe the projects to me?

A. Well, the project referred to is one in which the overwhelming population numbers of the island of Java were just packed up and sent off to these other farther islands that were less densely populated.

Tr. at 21, 23.

Q. So in 1985 you are saying the only wildlife-related activities were to visit the Itaipu Dam and the visit in the Andes?

A. In addition, I went to West Germany that year to attend the Meeting of the Parties of the Marine Mammal Convention, also called the Bonn Convention. This is a convention on migratory species...

Q. In 1984 you listed trips to Japan and to Spain, I believe.

A. Yes...

Q. Did you do any wildlife viewing activities?

A. Yes we did.

Q. What?

A. On the island of Hokkaido we saw red-crested cranes in their habitat. And I also looked for minke whales, but didn't see any.

Q. Are you aware of any U.S.-funded development projects in Japan?

A. Yes.

Q. Do any of those projects have an impact on wildlife, to your understanding?

A. Yes.

Q. Can you tell me what project, please?...

A. There is one case where the U.S. Navy has asked the Government of Japan for permission to build housing units in a natural area, and the local people are very much opposed to it. It's the prime nesting area for many birds.

Q. Do you know if this project is going forward?

A. As far as I know, it's going forward.

Tr. at 39-41.

Q. You visited Spain in 1984 as well.

A. Correct.

Q. Did you engage in any activities there that involved field work?

A. Well, yes. We went again to an IUCN general assembly meeting that was held in Madrid. I represented Defenders of Wildlife there. At the conclusion of the meetings we drove down to southern Spain, and there was a national park on the southwest side of Spain. I am sorry I do not remember the name clearly. It's Odonya something. There were a number of endangered species there, but we were unable to see them. But we did visit the habitat.

Tr. at 42-43.

Testimony Regarding Deponent's Relevant Activities Since Affidavit Filed in November 1986.

Questioned by Ms. Kolker:

Q. In 1988 you visited Costa Rica and Peru?

A. Yes...

Q. Can you tell me where you visited in Costa Rica?

A. We were primarily headquartered in San Jose which is the national capital. We attended the meetings of the IUCN that were held there.

Q. Did you engage in any field work while you were there?

A. Yes.

Q. What sort of activities?

A. We went on a field trip to the Pacific side.

Q. For what purpose?

A. For viewing wildlife and wildlife habitat...

Q. What areas did you visit in Peru?

A. We first went north, northeast to Hauascaran National Park, and I believe that's spelled H-U-A-S-C-A-R-A-N, or close to that ..

Q. And from there?

A. From there we went to [city] and to Machupicchu...Then we went to the coast to the Paracas National Park, it's a marine park...

Q. What sorts of activity were you engaged in during those, aside from riding in the van?

A. Well, when we were at Paracas, we went out into a number of short excursions to view the habitat and the scenery and the park values, and we were looking for the [spectacled] bear that lives in that national park. While we were there we saw vicuna, the V-I-C-U-N-A.

Q. Are you aware of any Federally-funded, or authorized, or carried out projects in the areas in Peru that you visited?

A. I know that the Bureau of Reclamation has a number of irrigation projects scattered all over Peru...

Q. Can you tell me where any of them are located?

A. No. I just have seen a summary in the Bureau of Reclamation publication...

Q. Which publication was that?

A. It's a publication that was included in John Fitzgerald's affidavit.

Q. Was that the Water For The World pamphlet?

A. Yes.

Tr. at 30-34.

Q. In 1987 you indicated you visited Africa.

A. Yes.

Q. Kenya and the Sudan. How long were you in Africa?

A. About ten days.

Q. And where were you?

A. Well, we were headquartered in Nairobi, but we went out on a number of field trips from there...

Q. Did you have occasion while you were in Kenya to visit any development projects?

A. We did see some forest experiment and agricultural experiment areas...

Q. Are you aware of any directly Federally-funded projects in Kenya?...

A. I believe that U.S. AID does give money. In fact, we visited U.S. AID headquarters. I know there is an office there and ongoing programs.

Q. You don't know what they perhaps are?

A. Not specifically beyond the forestry projects and the agricultural experiments there.

Q. Did you visit any of the forest or agricultural experiments?

A. Yes.

Q. Do you believe those to have, or to be financed by the United States?

A. Probably one of them was.

Q. Can you tell me which one?

A. It's the forest one.

Q. Which forest one?

A. I don't remember the name.

Q. Can you tell me where it's located?

A. It's about 30 miles out of Nairobi.

Q. In which direction?

A. East.

Q. And did you visit that site?

A. Yes.

Q. Can you describe the project for me?

A. The project consisted of trying to find ways to improve the productivity of forest trees, and also certain other agricultural plants. There were various experiments on watering, and some of them were in deep ditches so the water would collect. Others of them were not. There were experiments of having rows of one kind of plant, and then a row of another kind of plant, and so on, this kind of an alteration. There were experiments as to the density of the trees that were planted, and there was one area where there would be one space that would have very wide density, that's few trees, and then others with various amounts of density of trees to see how well they would do. Others that had sort of an underground sprinkling system...

Q. You visited the Sudan for a period of how long?

A. Oh, about four days.

Q. And while you were in the Sudan, did you visit any projects?

A. Yes, we did. We visited again another forest project.

Tr. at 35-38.

Q. Do you have any present plans to visit any Federally-funded development projects overseas?

A. We probably will visit some in India a year from now.

Q. That would be in 19—?

A. That would be 1989. Probably December of '89.

Tr. at 45-46.

Questioned by Mr. O'Neill:

Q. Maxine, on the project in Kenya that you visited—

A. Yes.

Q. —was that an experimental project?

A. Yes. It was an experimental station.

Q. So the idea would be that it would look at ways to do it for other parts of the country?

A. Yes.

Tr. at 47.

Testimony Regarding The Efficacy Of The Section 7 Consultation Process

Questioned by Ms. Kolker:

Q. Are you familiar with Section 7 of the Endangered Species Act, "Inter-Agency Cooperation"?

A. Yes.

Q. Can you tell me your understanding of that section?

A. That section means that whenever an agency of the United States Government is contemplating a project that would take place in another country, it is required to consult with the Fish and Wildlife Service to see if there would be any impact on endangered species in that foreign country.

Q. Is there any other purpose of that section, to your understanding?

A. The purpose is to develop expert material, expert information that would guide the U.S. agencies and the foreign Government involved in coming to a proper decision.

Q. What is your understanding of that consultation process?

A. Well, my understanding is that the best experts about wildlife matters and endangered species in particular are with the United States Fish and Wildlife Service. So the process means that you are getting the best information that is available that would help people make rational decisions, Governments make rational decisions.

Tr. at 10-11.

Q. Do you believe that there is a connection between the 1986 regulation on consultation which is being challenged here and those [Indonesian] translocation projects?

A. I think it's an example of the kind of project that really needs and requires this kind of consultation. It's an excellent example. It's an excellent example of the impacts

that can happen when projects are undertaken without adequate information.

Tr. at 26.

Q. Can you tell me then what the basis of your belief is that requiring consultation would prevent harm?

A. Well, the basis of my belief is that I believe that people and Governments are capable of making rational decisions if they have the adequate information. The U.S. Fish and Wildlife Service has the best experts on wildlife and endangered species in particular. So if the information would be sought from the Fish and Wildlife Service experts and distributed to U.S. Government agencies involved, then I believe that people will do the right thing.

Tr. at 46-47.

Testimony Regarding Deponent's Familiarity With This Action

Questioned by Ms. Kolker:

Q. What is your understanding of the purpose of this lawsuit?

A. It is to require the Fish and Wildlife Service to do what is mandated in the Endangered Species Act. The Fish and Wildlife Service is directed to consult with U.S. Government agencies on projects that affect foreign countries that would possibly have some effect on wildlife. So if this suit is successful, then the Fish and Wildlife should return to its former regulations which allow it, or under which it goes ahead and does consultations.

Q. How did you first hear about the regulation which is challenged in this lawsuit?

A. I read it in the Federal Register[.]

Q. Do you routinely read the Federal Register?

A. Yes. Not every word, but I do receive notices of the Federal Register that affect all of wildlife matters, and many environmental matters, and I read them...

Q. Do you know when the regulation was published?

A. Well, I think it was June of 1986...

Q. Did you participate in any way in the rule-making?

A. No. But I understand that the Defenders of Wildlife staff has been following these issues carefully.

Q. When did you communicate to the Defenders of Wildlife your belief that you would be [injured] by the Secretary's regulation?

A. As soon as I read about the notice in the Federal Register.

Q. And what action did you take?

A. I consulted with the organization's [staff] attorney, John Fitzgerald.

Q. Did Mr. Fitzgerald request that you prepare the affidavit you submitted?

A. Yes.

Q. Did you write the affidavit, or did someone write it for you?

A. No, I wrote it myself.

Tr. at 13-15.

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DEPOSITION TESTIMONY OF ELLIOT McCLURE, Ph.D.

December 15, 1988

Testimony Regarding Deponent's Personal and Professional Interest In Endangered Species Conservation

Questioned by Ms. Kolker:

Q. The affidavit says that you are a member of Defenders of Wildlife. Is that still true?

A. That's correct.

Q. You have been since the early 1950's?

A. At least, yes.

Q. It says you were a member of the board of directors...

A. That's still true. I'm a member until next spring.

Q. You are chairman of the Tropical Wildlife International Committee?

A. That's right...

Q. What sorts of activities do you undertake normally for the organization?...

A. Well, we have annual meetings that are—I should say semiannual meetings of the board itself. A spring and fall one. My function as chairman of the committee was to keep my contacts with environmentalists and research workers in other parts of the world, and where they had problems involving their environment, to ask me, and I would try to get the Defenders' support in the form of letters and comments to governments that were involved. This has proved to be very effective in several instances where we were able to have a positive effect.

Tr. at 6-7.

Q. Let's talk about what has happened. Let's start with how many trips abroad you have made this year...

A. My last trip abroad was in '83 when I took a tour of 25 people to Southeast Asia.

Q. What country did you visit then?

A. Well, we did Malaysia and Sumatra and Borneo. Those are parts of the other countries. Then I did Thailand and bits of Japan at the same time. But I took the tour through those three countries.

Q. You did Thailand and Japan separately?

A. Yes. I stopped in Japan to check the research I have got going there.

Q. In the 1983 tour that you took, was that solely to view wildlife?...

A. Yeah. That was the object of it. The people went to see nature.

Q. What sorts of activities did you engage in?...

A. Well, every morning we went out, went bird-walking and mammal-walking and spent the rest of the day looking for gibbons and orangutans, what-have-you...We took—it was a 21-day trip.

Q. Your trip to Thailand was following that?

A. No. I was in Thailand for a couple weeks. Two weeks there.

Q. Then Japan?

A. Just two days. All those areas are places I had lived a long time. I lived in that part of the world from 1950 to 1975.

Q. In Thailand what sorts of activities were you involved in?

A. Well, I have a protege, I might call her, or student or research assistant that now is on her own, a Thai girl by the name of Pilai Poonswad. But, anyway, she is continuing the research on hornbills. They are large birds that live in the rain forest. So I went to—this study is being made at the Khao Yai National Park, and I went to Khao Yai National Park with her and checked out her study of the breeding areas of the hornbills...

Q. You mentioned in your affidavit that you were sponsoring continued research on endangered helmeted hornbills. Is this the project you are referring to?

A. That's right. It's still the same project...

Q. You visited Japan two days?

A. Yeah. That was just to meet friends there. See, between 1963 and 1973 we set up an international bird banding operation, and we had about 60 people on the field in 13 countries, and we were studying bird migration and the movement of parasites. It was a medically oriented study...And now Japan has a very active bird banding program, and he is chairman of it. And so I stopped in to see how he was doing with his banding work...

Q. Your affidavit says you were with Walter Reed Army—

A. —Institute of Research. Yes. All during those 25 years I was there. Walter Reed Institute of Research is, of course, oriented towards medicine, because that is by Walter Reed...And our program involved basically a study of diseases called zuoneses, Z-U-O-N-E-S-E-S. These are diseases that affect man as well as other animals. Most of them are diseases of birds, and we wanted to know in what way they were involved, if any, with the disease in man. So that accounted for such things as an international study of bird movement and so on. That was the whole 25 years until I retired.

Q. Did you have any specific professional responsibilities during that period of time for dealing with endangered species?

A. Any special responsibilities dealing with endangered species. Only in the sense of general information wherever it was available to me. I did a study of the gibbons in Malaysia and their family life...Yeah, gibbons are endangered.

Q. Was that related to your medical research?

A. Yeah. Yes, it was. And although we had to work around wild elephants, we didn't work with wild elephants. And then again, mainly the bird involvement. It's hard to say now. At those times some of the animals were not endangered but have since become endangered. Such things as some pittas, little birds called June Finches. And some of those have been endangered through destruction of the environment.

Q. You state in your affidavit that United States aid and funding for dams and development in both Thailand and Malaysia have harmed endangered wildlife. What is the basis for your belief that is the case?...

A. First, we'll take Khao Yai National Park in Thailand. That is where we have had a very critical situation. It is park of about 2,500 square kilometers. That's about 900 square miles. And it's in the center of the country; rain forest of several types. And it is the headquarters for three drainage systems that drain down through the center and the southern part of the nation. And developers wanted to put in three dams to flood a large part of the section of the center of the park, a large section of the cener of the park and develop hydroelectrical power for the farmlands surrounding the park. And in so doing, they would—if so altered, chances are the park itself would have been destroyed...Then the past three years they began agitating for a dam on the River Kwai in an area which—

Q. Excuse me, Doctor. When you say "they," can you tell me who you are referring to.

A. Okay. The department of the Interior, the Thai Department of Interior and Economics, it would have to be...two departments, would have to be the ones that were interested in it, and of course the public construction...

Q. Are you aware of any United States funding for that project? Direct funding.

A. It was, again, supposed to be through the World Bank as far as the one on the River Kwai. The one on Khao Yai, definitely we were told it was supposed to be from the World Bank.

Q. All I am interested in is the source of your information..

A. My only answer to that could be that it would be from newspaper articles and from conversation with government officials...

Tr. at 19-30

Questioned by Mr. Anderson:

Q. What, if any, endangered or threatened species have you observed?

A. Gee. In the wild?...

Q. In the wild under their natural habitat...

A. Wild elephants. We spent months trying to see the Sumatra rhino, which is called the one-horned rhinoceros, and we had one mother and her calf under observation... And several species of monkeys and several species of birds, and right on down the line. Wherever they were available and I had a chance to work with them.

Q. Would you have any kind of harm if any of those endangered species no longer existed or became extinct?

A. [illegible] the harm would be twofold. One would be deep [illegible]nal involvement because of the fact that I do know them and have worked with them. And the other would be professional, because my professional research and people that are carrying it on would be forced to stop. So they would have both professional and emotional impact, yes...

Q. Is it possible for you to tell us what the harm would be if the Nam Choan Dam were completed?

A. —the World Wildlife [fund] supported a young man...who did a study of the elephants both in Malaysia and in Southern Thailand. And he found that there were movements across this valley at different seasons of the year which were involving the breeding cycle of the elephants as well as their food habits. And flooding all that area would isolate the herds and could be expected to be of considerable damage to those herds.

It has reached the point now where the number of elephants that are still in the wild are very few, even in Thailand. So anything like that is harmful for the species.

Tr. at 41-43.

Testimony Regarding Deponent's Relevant Activities Since Affidavit Filed in November 1986

Questioned by Mr. Anderson:

Q. Do you continue to have contacts regarding research of endangered or threatened species in Southeast Asia?

A. Yes.

Q. Could you describe for us those contacts . . .

A. Well, in 1963 I began a study of the hornbills of Khao Yai National Park and continued it until my retirement in 1975. During that period of time I had a number of students and young people that were interested, but one in particular, this Miss Pilai Poonswad, became very deeply interested, and so she and I worked up a proposal, a research proposal for continued studies of hornbills which involved their life history and their food habits and the way they are supported in the forest and a very intense—a very, really complete study, what she has gone ahead and done . . .

Now, in Malaysia I haven't had as much opportunity to be involved in any specific research program. However, the University of Malaysia has been continuing in their studies of gibbons that I began in between 1957 or 1963 in the forest above the capital city of Khampal and Nuporkawol and Napoor.

Q. I want to know what your current research interests are.

A. Mainly functioning on the Khao Yai studies right now.

Q. So that would be the hornbills?

A. Hornbills. And it so happens that the one hornbill, the helmeted hornbill, which is one of the largest, is being listed as endangered. And since Pilai has gotten into the study and we now see how closely attuned the birds are to the forest, the entire family in Southeast Asia, about 35 species, are all endangered.

Q. Are the other hornbill species endangered or threatened?

A. Threatened, yeah...

Tr. at 38-41.

Q. You mentioned in your response to a question of Ms. Kolker that there was some additions that you wanted to make to your affidavit in light of what has gone on in the past two years; is that correct?

A. Uh-huh.

Q. What is the first addition you would like to make...

A. In paragraph 3 under "Personal Interests," I wanted to delete the "and continue to study and enjoy." I do not think I will have a chance to do that.

Q. Because of your age?

A. Because of my age. And then as the last sentence, "As research consultant, I maintain an interest in my colleagues' continued research in these areas which were above."

And then in paragraph 7 delete, "I plan to return to Thailand and Malaysia to continue my enjoyment of and research on wildlife." The important word there is "plan." I do not have plans for that.

Q. Again, is that because of your age?

A. Yeah. And financial condition. Now, I think this is too broad –

Q. Which paragraph are you referring to, sir?

A. Paragraph 8.

I think this is too broad. It's the line saying, "And the largest population of Asian elephants in Thailand which will be destroyed by the Nam Choan Dam." I think that is much too strong. Depleted or destroyed being a better adjective there...

Q. Okay. Continue...

A. Then down in the next paragraph, but it isn't numbered, beneath 8 there, this refers to the Mekong River Basin in Thailand and Laos with the reservoir that would irrigate 4.9 million acres. I wish to insert there,

"The resulting environmental destruction to bring this much land under cultivation would endanger numerous species as well as the Asian elephant and tiger and could harm research projects and staff of vital interest to me."

Now, in paragraph 9 I wanted to mention some of these animals and birds that are endangered. I only added two. So the sentence that read, "Portions of 100 species of mammals and 300 species of birds, some already near extinction such as White Eyed River Martin," M-a-r-t-i-n. Kitti, K-i-t-t-i, Kitti hog-nosed bat, both animals were originally discovered there, and the Sumatran rhinoceros in Malaysia, the Asian tapir and elephant have been endangered by the building of the Temenggor Dam in North Perak, Malaysia.

Paragrah 11 I wanted to substantiate a little more what was in that paragraph. You quizzed me more on No. 12, but for 11 I wish it to read, "As a student of ecology the destruction of endangered wildlife by the alteration of their environments in these and other areas harms me personally and professionally by depriving me and my colleagues of the opportunity for further research and reduces the natural base of the ecosystems important to all of us."

Tr. at 48-52.

Testimony Regarding The Efficacy Of The Section 7 Consultation Process

Questioned by Ms. Kolker:

Q. In paragraph 12 of your affidavit you state that, "Requiring consultation between the Secretary of Treasury and others and the Secretary of the Interior would help avoid harming and jeopardizing the endangered wildlife now threatened by projects described in this affidavit." Can you tell me the basis for that statement?...

A. The physical basis would be seeing what was happening in similar situations regardless of by whom they were being financially supported. And then the emotional

basis would be my opinion of what would happen to my field observations under the circumstances...

Q. Can you describe to me why you believe that requiring consultation between the Secretary of the Treasury and the Secretary of the Interior would avoid the harm?

A. Well, the Secretary of the Treasury must be involved in the original Act, Endangered Species Act, or required, shall we say, to have a consultation with the Secretary of the Interior or to see that one takes place, and that is why I have him in here, in this position. The act of consultation and thereby bringing forth by scientific and intellectual discussion the possible effects and their mitigation is, of course, to my mind one of the very few, if not the only real recourse, that we have to bring before local governments the information that they need and possible ways in which they could avoid harming or jeopardizing endangered wildlife.

Tr. at 32-35 [sic].

Questioned by Mr. Anderson:

Q. You gave some testimony with regard to what effect the consultation would have if there were consultation involving foreign projects, whether that would help. Do you recall that?

A. Well, my opinion of the consultation is that under the systems that we have developed in a democracy, there is little other ways – there is few other ways which you can effect any action then by consultation and examining all of its potentialities. And, so, to me, this consultation is the crux of the whole thing...

But under consultation where everybody is – gets together and sits down and looks at the whole project and looks at the attributes and environment is supposed to be in and the plants and animals that are supposed – that are there, the consultation is the only way to bring it into focus in such a way that those people who are planning to make use of it can either conceive of the mitigating meth-

ods or give it up altogether. So it looks to me like the use of consultation is the most dynamic method that is available.

Q. From your own experience do you know whether if, for example, a foreign government were presented with a consultation report that said that a project, if done, is in some way going to harm the environment whether they would act on this or just ignore it?

MS. KOLKER: Objection. Calls for speculation.

MR. ANDERSON: I asked based on his experience.

THE WITNESS: Yeah. It's not speculation. I've seen it in action. A lot of foreign governments of small nations, I don't mean necessarily small in size, although that is usually the case, but at least people that haven't had the vast resources that we have, the government officials are quite susceptible to the concept that they gain face, that they gain recognition internationally if they do something that will protect their environment...

I can show this having happened in the last three years in Taiwan. Taiwan has a large gorge in the east coast, the east mountain range...I think it was about 1986, '85 or '86, I got word from one of my cohorts, the young man that worked with me and now with the Asian foundation, said the Taiwanese Government has decided to put two dams on the tributaries of the river that form this great gorge...He wrote to Defenders, wrote to me. I took it up with Defenders. Other people took it up with other agencies, other organizations, and we began writing letters. And the Taiwanese Government officials were so impressed by these letters that even the Minister of Economic Development was convinced that they made a mistake. And they made their first national park for the whole country out of this Taroko Gorge, and it's a direct effect of letters from American people.

Tr. at 43-47.

Questioned by Ms. Kolker:

Q. You have referred to this project in Taiwan. Do you have any reason to believe that that was funded by any American agency?

A. No. No, it wasn't that. I've only used that as an example of how American interest can produce a positive effect.

Tr. at 54.

Testimony Regarding Deponent's Familiarity With This Action

Questioned by Ms. Kolker:

Q. What is your understanding of this particular lawsuit? I am referring to the Defenders of Wildlife vs. Donald Hodel.

A. My understanding of that is that the clause which required that any agency that was destined, shall we say, to spend money, to give moneys to an organization...for expenditure overseas or to expend money themselves overseas for any type of project that would involve environment, must first, before that proposition would become an actuality, such as whether a dam be built or a road or anything like that, would have to have consultation with the experts in the Fish and Wildlife Service to determine the probable effect of such a project. And that was my—it was my understanding that is the way it was set up.

But in 1986, I guess it was, that clause was, can I use the word rescinded or altered, so it was no longer necessary to have consultation. And it would appear to me that the Defenders' suit is based upon that situation, whereby the Fish and Wildlife Service took it upon themselves to change a clause that was in the original Act when we feel that it was very important to be retained.

Tr. at 14-15.

DEPOSITION TESTIMONY OF J. CAMPBELL PLOWDEN

December 19, 1988

Testimony Regarding Deponent's Personal and Professional Interest In Endangered Species Conservation

Questioned by Ms. Kolker:

Q. Can you tell me your current employment?

A. I currently am the Whale Campaign Coordinator for Greenpeace, USA, and volunteer president and executive director of TERRA, Tropical Ecosystem Research and Rescue Alliance.

Q. How long [have you] held that post?

A. I have been with—I have held this current post with Greenpeace since January of this year and a similar position before 1985 as well.

Q. And prior to that January of 1988 where were you employed?

A. I was employed as the Whale Campaign Coordinator for the Humane Society of the United States in Washington between 1985 and 1987.

Q. In 1987 where were you employed?

A. Well, I worked at the Humane Society of the U.S. until the end of 1987 and came back to Greenpeace in early 1988.

Q. Your affidavit states you received a BA in biology with an emphasis in ecology and environmental studies. Have you had any further formal education since 1975?

A. Formal education, no. But I have devoted my life to environmental activities and ecological studies.

Tr. at 6-7.

Q. In your affidavit on page 3 at paragraph 7, you discuss a visit to Brazil and Peru in 1986. You list visits to Carajas...iron ore mine and Balbina hydroelectric power dam which you apparently believe are financed by the World Bank. What is the basis for your belief that those are World Bank projects?

A. Well, I researched the Carajas iron ore mine beforehand and discussed it with World Bank officials and the Balbina dam, while not a direct World Bank project, has received funding under power sector loans to Brazil from the World Bank.

Q. Did the Carajas project go forward?

A. Yes, the iron ore project itself is now complete and the Grande Carajas project is under consideration for further funding by the World Bank.

Q. Do you believe the World Bank to be a Federal agency?

A. It is not strictly a Federal agency, but has very direct influence and funding from the United States Government through the Department of Treasury, and an American is traditionally now the president of the World Bank.

Q. The two projects which you listed in that same paragraph 7, Polonoroeste and Rondonia, the Samuel dam, you believe those also to be World Bank funded projects?

A. Yes, in part both have received funding from World Bank.

Tr. at 13-14.

Q. In paragraph 8, you mention a trip in 1986 to Peru and an Agency for International Development project. Did you visit that project?

A. I did not visit that project specifically, but went to jungle region near Iquitos, Peru which shares many of the same ecological properties and many of the same species in that area.

Tr. at 15.

Q. In addition to the countries that you listed in your affidavit, are there other countries that you visited in connection with your concern for wildlife?

A. . . . I referenced the Serengeti. So during a visit to the Serengeti region when I was 12 years old, I visited parts of Uganda, Kenya, Tanzania. I also lived in India for one year, briefly visited Ecuador, Uruguay, Argentina.

Q. These are in addition to the countries you have listed in paragraph 3 of your affidavit?

A. Yes.

Q. Are you aware of development projects directly funded by the United States which are currently going on in any of those countries?

A. I believe U.S. AID is still active in the Philippines and India, but I do not have information about projects there. . . .

Q. TERRA, the organization which you founded, are you presently conducting research in an area which you believe to be impacted by United States development projects?

A. TERRA is active as a nongovernmental organization within the International Tropical Timber Organization, and through our involvement with the ITTO, we are giving our opinions on a whole range of timber projects in many parts of the world, some of which the U.S. is active in through AID projects.

Tr. at 22-24.

Questioned by Mr. O'Neill:

Q. I am interested in the paragraph 8 of your affidavit in which you talk about the Picchis-Palcazu project. Would the Picchis-Palcazu project have had an impact on the population of jaguars, Uakari and Geoldi's marmoset for the area in which you visited?

A. Yes. It could have.

Q. Why is that?

A. The area that I visited and the area of the Picchis-Palcazu project are contiguous areas of tropical moist

forest and reducing the population in one area affects the population in its entirety, reducing the size of the gene pool and making it that much more vulnerable to catastrophic events.

Q. What was the nature of the Picchis-Palcazu project?

A. It was or properly still is a forestry project involving clear cutting strips of timber for a development project for native people to market those timber products. And it's a[n] experimental forestry system for doing that.

Q. It's an experimental forestry system?

A. Yes.

Q. What does that mean?

A. They were experimenting to see if a sustainable system of clear cutting strips of timber could be done in a way which would allow for natural regeneration of the timber over a period of time.

Q. So it's a prototype?

A. Yes. It was a prototype which, if successful, could be expanded to other parts of the Amazon.

Tr. at 25-27.

Testimony Regarding Deponent's Relevant Activities Since Affidavit Filed in November 1986.

Questioned by Ms. Kolker:

Q. In paragraph 12 of your affidavit, you indicate that you planned to visit Rondonia – and I don't know how to pronouce the second one.

A. Acre.

Q. – to visit projects there. . . .

Q. In addition to the funds provided by the World Bank and the Interamerican Development Bank, do you believe there are funds directly committed by U.S. agencies to either of those two projects?

A. No, I'm not aware of that. Since I wrote this affidavit, however, there is an additional concern. . . . The projects in question in Rondonia and Acre have been an extension of paved road from southern Brazil out to virtually the western border of the Amazon, and there is an expressed interest in both Peru and Brazil to potentially complete a road between Acre and Peru; and if there is interest in going ahead with that project, since the U.S. has been active in Peru, I would be concerned that U.S. AID might be involved on the Peru side of that which would have just as great, if not greater, impact on endangered species in Brazil even if the project was only funded on the Peru side.

Q. What is the source of your belief that AID would sponsor such a project?

A. I don't have specific information that they would sponsor, but since AID has been active in Peru in the past, it seems there is at least the possibility that they would be potentially interested in such a project.

Q. Your affidavit states that you plan to visit parts of the Amazon and in Peru where the U.S. AID has been active in sponsoring various development projects. Which projects?

A. I mentioned the Picchis-Palcazu project and in the affidavit, as I stated, I have not visited there, but I would like to visit there in the future.

Q. Do you have a present plan to go there?

A. I am planning to go back to the Amazon next year and if possible I will also visit that specific project.

Tr. at 18-21.

Testimony Regarding the Efficacy Of The Section 7 Consultation Process.

Questioned by Ms. Kolker:

Q. You mentioned that reducing the size of a population in one area affects the gene pool. What is the basis for your belief that the size of the population was actually reduced in the Picchis project?

A. Well, I don't believe I said it was reduced. I believe it could have been reduced. I am aware of the forestry aspects of the project, but I did not do specific field research to be able to verify that. In fact, this is one of the reasons I think why consultation would have served a very useful purpose here. There were no base line studies done which could have enabled anyone to even render such an opinion at this point. . . .

Q. So you are not aware—you have not done any research and you are not aware of any research on the actual impact of the project on wildlife? . . .

A. From my training as an ecologist and generally having an understanding of how wildlife operates in its habitat, one can make certain predictions about how this type of system will impact wildlife.

Tr. at 28-29.

Testimony Regarding Deponent's Familiarity With This Action

Questioned by Ms. Kolker:

Q. Can you tell me to the best of your understanding the purpose of Section 7?

A. The purpose of Section 7 is basically a requirement that any Federal agency which is conducting an action which could affect a listed endangered species is required to consult with the relevant agency, whether the Department of Interior, Fish and Wildlife Service or with fish-

eries species with the Department of Commerce, National Fisheries Service to get their opinion, recommendations concerning the impact that action would have on those species.

Tr. at 8.

Q. What is your understanding of the purpose of this lawsuit?

A. The purpose of the lawsuit, as I understand it, is to basically codify that the Secretary—excuse me—that any Federal agency will be required to carry out the relevant consultations under Section 7, no matter where this Federal action takes place, be it in the United States or internationally. . . .

Q. How did you first hear about the regulation which is being challenged in this lawsuit?

A. Well, when I was a staff member at the Humane Society of the U.S., John Grandy told me about it and subsequently I volunteered that I had had certain experience doing field work in relation to endangered species abroad and so discussed how my experience might be of assistance with him and John Fitzgerald.

Q. Do you remember when that was, when those discussions took place?

A. It would have been in general in the middle to summer-fall 1986 after I returned from several months in the Amazon. . . .

Q. Did you write your affidavit?

A. Yes, I did.

Tr. at 11-13

DEPOSITION TESTIMONY OF STEVEN C. SCHROER

December 14, 1988.

Testimony Regarding Deponent's Personal And Professional Interest In, And Litigation Ability Regarding, Endangered Species Conservation.

Questioned By Mr. Shockey:

Q. Are there other professional degrees or any formal training that you have had particularly in regard to wildlife matters?

A. Actual degrees, no.

Q. What about training or graduate courses? . . .

A. I might add in that regard . . . I do have training in international law both from my undergraduate legal institution Columbia and a postgraduate degree I took at Cambridge, and I did do some study of environmental law and environmental – international environmental legal matters.

Tr. at 6.

Q. Before this case, had you worked on other Endangered Species Act litigation?

A. I have had involvement in some, yes.

Q. Do you recall what case or cases there were?

A. Well, the Minnesota wolf case I have had some.

Q. That was *Sierra Club versus Clark*?

A. Yes. Well, not all the work we have done as a result of the litigation. I have assisted in some work relating to the grizzly bear out in Montana. There have been other things, but off the top of my head, that's what comes to my mind.

Q. Apart from this lawsuit, have you had involvement in any matters or lawsuits involving the Endangered Species Act that related to actions outside of the United States?

A. I'm digressing for a second. The Strychnine case I think has allegations under the Endangered Species Act and I have had some involvement in that too. Actions outside the United States, the Strychnine case and perhaps some other cases that I have worked on including the wolf case, I believe have in part concerned or had issues that related to treaty obligations of our government, particularly treaties in Canada.

Tr. at 10-11.

Q. And near the end of Paragraph 3 [of your affidavit] you indicate, as you mentioned earlier, that you prepared a master's thesis at the University of Cambridge that dealt with, I'm quoting from the affidavit, "international law regarding an anadromous fish species."

A. Yes. . . .

Q. Did that thesis address international law regarding the fisheries in any particular geographic area, for example, the Facific Ocean in the Pacific Northwest of the United States or the North Sea?

A. I haven't read that thesis in a long time because my copy burned five years ago in a fire we had in our law firm, but the way I remember the thesis, its first part discussed generally international law, particularly questions of international jurisdiction relating to fisheries' matters. . . . Then I believe in the latter part of the thesis there was some analysis given by illustration of how I then perceived the current state of the law might apply to certain circumstances. Among the things I discussed were the fishery for Atlantic salmon and the fishery for Pacific salmon. And I believe I discussed in that context whether, as a matter of international law, I believed that an individual nation had the jurisdiction to regulate the activities of both its own citizens and foreign citizens both in its own territorial waters, in the high seas, and in territorial waters of other countries.

Q. Did you reach a conclusion regarding the territorial waters of other countries?

A. I believe my conclusion was that a country such as the United States, as a matter of international law, always had jurisdiction to proscribe the activities of its own citizens and its own agencies, whether or not their actions are taking place within their geographical confines.

Tr. at 25-27.

Q. What endangered fish do you enjoy?

A. Endangered fish?

Q. Yes. . . . Well, you indicate in the affidavit that you have an interest in quote, "personally enjoying endangered or potentially endangered fish."

A. There is—let me be clear. I have never seen an endangered fish. I would like to see one, and I would like my right to see one to be protected. And my interest in endangered fish is aesthetic and intellectual because I have never had the opportunity to see one. . . . There is, I think you will find on the endangered species list, a golden trout which inhabits mountain lakes, I believe, in Mexico and the western United States and I have a great interest in that particular fish.

Q. Have you personally ever visited the habitat of that fish?

A. I believe I have. They are pretty rare and as I say, I have never seen one but I have visited Mexico and hiked in the mountains and I have hiked in the mountains in the western United States where I believe golden trout may still exist in some places. . . .

MR. O'NEILL: I think it's the yellow kern golden trout to be specific, that's how they are on the list I looked at. . . .

Tr. at 35-36.

Q. Okay. Have any of these trips been for the sole or principal purpose of observing wildlife in general or endangered species in particular?

A. I think on virtually every trip I do I make an effort to get out and see whatever wilderness type areas and natural habitat I can get to. Whether it's ever been for the specific purpose of looking at those depends on the circumstances. . . . [S]eeing an endangered species is a pretty rare thing but I have seen grizzlies, I have seen from the air at least wolves.

Q. Outside of the United States?

A. The wolves I have seen were up in the Boundary Waters, I think they were on the American side of the border. I have seen eagles probably in—probably in Canada. . . . I have also observed bald eagles that I know have migrated from Canada. There is a wonderful place in Glacier Park where if you're there at the right time of year you can see hundreds of bald eagles at the same time.

Q. How do you know that they migrated from Canada?

A. Well, I didn't watch them fly but I have read that in the Department of Interior literature that told me what I was looking at.

Q. I'm sure that's an unimpeachable source. . . . To your knowledge have you ever seen any listed endangered or threatened species outside the United States?

A. Well, when you're up in the Boundary Waters you sometimes aren't sure which side of the border you're on. I have seen bald eagles up in the Boundary Waters Canoe Area and I can't tell you for a fact that I have seen them in Canada, but I have seen them in that general international boundary area.

Q. Any others come to mind?

A. Gosh, I thought it was pretty good having seen three kinds of endangered species anywhere.

Tr. at 47-49.

Questioned by Mr. O'Neill:

Q. Did you have an understanding as to the purpose of your affidavit when your affidavit was prepared, executed and submitted to the Court?

A. I did.

Q. And what was that?

A. It was to illustrate my own personal interest in this matter and the legal subjects of this matter, also to illustrate my experience and what I believe to be my abilities as attorney for the—as an attorney for the Plaintiffs in this matter, which I believe will help assist in vigorous litigation and identification and analysis of the legal issues involved. In other words, to help show the adverseness of me and my clients to the government's position.

Tr. at 65.

Testimony Regarding Deponent's Relevant Activities Since Affidavit Filed In November 1986.

Questioned by Mr. Shockey:

Q. Could you just briefly identify what those documents are?

A. I brought my current passport. I brought my prior passport which expired in 1980. I brought a copy of Volume 12, Number 2 issue of a periodical called *Cultural Survival Quarterly*, it's my personal copy of that which I received sometime last fall. I brought a map of Thailand and I brought an airline ticket that I have in connection with a trip I will be taking to Thailand leaving on Christmas Eve day.

Tr. at 12-13.

Q. What is the date that that document [*Cultural Survival Quarterly*] was published? The magazine quarterly?

A. It's the—it's Volume 12, Number 2, 1988 and I believe I received it in the fall of 1988, that is within the last several months. Of particular interest to me, because of my upcoming trip to Thailand, is an article beginning at Page 13 of this issue regarding the Nam Choan Dam project in Thailand.

Q. Could you spell Nam Choan, please?

A. Two words, N-a-m, C-h-o-a-n. Mention is made at Page 15 within that article that this proposed dam would have included potential "loss of rare lowland riverine forest, which is the preferred habitat of the endangered green pea fowl and is seasonally important to many mammals such as tapir, tiger, wild cattle and elephant; blocking of the migration routes of large mammals such as elephant and guar; and fragmentation of animal populations into smaller units, thus increasing the chances of extinction through inbreeding and accidental fluctuations."

Tr. at 14-15.

Q. Could you briefly identify foreign countries that you have traveled to other than those listed in your affidavit? . . .

A. I tried to get in Fiji but they had a military coup and they weren't allowing people in. Then in the next two weeks or three weeks I hope to have also visited Thailand and Hong Kong, perhaps dribbling over the borden into a couple of other adjacent countries if that kind of travel is permitted. . . .

Tr. at 46-47.

Q. Do you recall those projects offhand?

A. I recall the reference to them in the litigation papers. I don't, expect with respect to the Nam Choan Dam which I was talking about earlier that I hope to be visiting in a couple of weeks, I don't have personal knowledge about those other projects. . . .

Q. So I take it you have not toured any of the sites of these projects and don't at this point have any firsthand knowledge of what the projects involve or what species might be present?

A. My own – personally not yet. I, as I say, hope and expect two weeks from now to be in Thailand and at that time to visit the site of the proposed Nam Choan Dam, but as of this moment, you're correct.

Tr. at 50-51.

Q. What – you mentioned several times the trip you're going to be taking very shortly to Thailand and perhaps to some other countries. What is the purpose of that trip? Are you going as a tourist or is this a business trip?

A. It's not a business trip. It's to pursue my interest in travel and seeing countryside. I hope, for example, to spend some time hiking around the areas in Thailand where there are indigenous hill tribes including the Nam Choan area where, at least according to what I have read, there are Khmer and Karen tribes, people who are still living in essentially wilderness type areas where coincidentally there also happens to be this dam project and a number of endangered species. . . .

Q. Do you plan to visit the site of the Nam Choan Dam project?

A. Well, it's not a project yet, but I hope to visit that area.

Q. Do you now where the project site is to occur?

A. From what I have read here, yes, I have a map I can show you.

Q. Yes, why don't you, I would be interested in seeing. You might just identify that map for the record.

A. This is Hildebrand's Urlaubskarte of Thailand Burma, Malaysia and Singapur [sic]. And I guess I can show you how I have figured this out. As a matter of fact, I put

a red box around the general area where I believe the project is. It's northwest of Bangkok and south of Chiang Mai. And this article describes the area and contains a more detailed map showing the proposed Nam Choan Dam site directly—appears to be at least directly south of Tak and I'm pointing to an area within that red box that I have drawn on the map where I believe it to be. . . .

Q. And where do you plan to travel in Thailand?

A. Well, I'm not the kind of person who goes with specific reservations, but my plan is to spend two or three days in Bangkok then travel up to Chiang Mai and explore that general part of Thailand . . . the north and northwest part of Thailand including the area we have just been talking about where that Nam Choan project [is].

Tr. at 53-56.

Testimony Regarding The Efficacy Of The Section 7 Consultation Process.

Questioned by Mr. Shockey:

Q. Okay. Do you know if the Secretary has the authority to stop a project from going forward based upon the results of the consultation if he finds it is, for example, likely to jeopardize an endangered species?

A. Well, if he is of that view, it's certainly his duty to give that advise [sic] to the action agency and I also believe it's the duty of the action agency to abide by the requirements of the Endangered Species Act and other things. I'm not sure if I have a view without reviewing the statute on whetner the Secretary of the Interior is actually empowered to himself enjoin or somehow order a coordinate agency not to do something. I think the intent, however, is that he at least give that expert consultation that Section 7 contemplates and I would hope and expect that coordinate agencies would take that consultation into consideration

at the very minimum when deciding what they are going to do or not do.

Tr. at 23.

Q. What I hope is my last question, could you please explain how the amendment to the regulations by the Fish and Wildlife Service in 1986 will change the consultation requirements in a way that affects you and your interests in endangered species?

A. Well, as I think I have illustrated to you, I have substantial professional, personal, intellectual and aesthetic interests, not only in environmental matters generally and Endangered Species Act matters specifically, but also a great personal involvement in international things, travel and the like. I enjoy not only studying these things and reading about them and, you know, working on litigation like this relating to these matters, but I like to experience those things out in the real world, such as through the trip I'm going to be taking in a couple of weeks to Thailand. My interests of those sorts, for example, to visit habitat where I know endangered species are believed to exist, even if I never see them, is important to me.

I believe that the Section 7 mechanism provides a procedure by which, what I hope are the countries best experts, the Fish and Wildlife Service people, can give their views based on their expertise to my government when it's doing things in foreign countries which will help protect places like the area in Thailand I'm going to go, protect the habitat there, protect the endangered and other wildlife, potentially endangered species that are there and thereby protect my own personal interest, not only in studying those things and reading about them, but actually visiting those areas.

Q. If it turned out that the Secretary or federal agencies in fact did not consult on projects in which they were

involved in foreign nations before the 1986 regulations, and if the regulations have now been changed to on their face eliminate that requirement, how will the change in regulations affect your interest in enjoying these endangered species' habitat activities? In other words, is there going to be any difference between if you assume that there was not consultation before '86 and the regulations do not now require consultation?

A. If I assume that prior to '86 the agencies were not complying with the law?

Q. No, don't draw the legal conclusion. I'm just saying they are not consulting, they didn't consult, whether or not they were required to. . . .

THE WITNESS:

Well, you know, my general reaction to that is two wrongs don't make a right. I mean, if they were not consulting pre-'86, in my view, they were violating the law; and I don't think that purporting to condone that violation by changing the reg on a post-hoc basis makes what they did before right and what they're going to do in the future any more right.

I hope that the assumption, the premise of your question that they weren't consulting is wrong, and I firmly believe and trust that when Judge Alsop and the Court of Appeals and the Supreme Court, if it gets that far, direct the agencies to consult, as I think they will, that they will now comply with the law even if they haven't in the past. That's the remedy that I'm looking for to protect my own personal interests in these matters.

MR. SHOCKEY:

You can rest assured the Justice Department will advise the agencies to do so if that should happen.

Tr. at 60-63.

Testimony Regarding Deponent's Familiary With This Action

Questioned by Mr. Shockey:

Q. Could you briefly state your understanding of the relief that the Plaintiffs are seeking in terms of the Endangered Species Act or ESA?

A. Under Section 7 of ESA there is a requirement, according to my own understanding, that when agencies of the federal government are going to take or authorize action that may affect habitat or existence of animals or plants covered under the Endangered Species Act, that they consult with the Fish and Wildlife Service or other experts within the government to assure that there is no jeopardy to endangered species or plants or if there is some, to propose alternatives and to advise federal agencies proposing such action as to what they think ought to be done.

It's my understanding that the Department of Interior proposed a new regulation which would dispense with that consultation requirement for purposes of United States agency action which may take place in foreign countries and the relief sought is an injunction prohibiting the Department of Interior from eliminating that consultation requirement as to agency action in foreign countries.

Tr. at 8-9.

Q. Were you aware of [the 1978 Rule's] geographic scope in terms of whether it was limited to the United States and the high seas?

A. I'm not quite sure how to answer that. It's always been my view that the Endangered Species Act applied to actions of the United States citizens including government agencies wherever in the world they may be, and whether I was specifically aware of how the regulation dealt with that in terms of what it said geographically, I don't really remember.

Tr. at 10.

DEPOSITION TESTIMONY OF AMY K. SKILBRED

December 15, 1988.

Testimony Regarding Deponent's Personal And Professional Interest In Endangered Species Conservation.

Questioned by Mr. Pollard:

Q. You were, at one time, a member of—a staff person on Defenders of Wildlife, weren't you?

A. Yes.

Q. From what days?

A. I was a staff person there for two and a half years. Let's see. 1984, August of 1984—that was the last election, right—through until February 1987, to the best of my recollection.

Q. Okay. And what was your job title?

A. Alaska Public Lands Specialist and National Wildlife Refuge Specialist.

Q. And could you just briefly describe what your duties were for the Defenders at that time?

A. I planned and decided the Alaska program for Defenders of Wildlife, including what issues we would pursue, how we would pursue them, grassroots outreach, press, media development. And then for National Wildlife Refuge issues, I worked with another staff member on refuge issues, including the refuge programmatic EIS, and on specific refuges, as well.

Q. Is your interest in wildlife primarily recreational or professional at this time?

A. It is still primarily professional, but recreational—I do a fair amount of bird watching, watching wildlife, so I guess it is a combination.

Q. In what respect would it be professional at this time?

A. The jobs that I'm looking for up here and the sort of career jobs I'm looking for would still have to do with

wildlife, environmental protection, habitat protection and pollution problems.

Q. Have you applied for any employment in any wildlife organization or habitat professional organization here in Alaska?

A. I haven't yet applied, but there are several positions open with the Department of Environmental Conservation, and a position with the Environmental Protection Agency.

Q. That's the State of Alaska –

A. The State of Alaska.

Q. – Department of Environmental Conservation –

A. Right, and the Federal Environmental Protection Agency.

Q. What was your employment just prior to working for the Defenders?

A. I worked on Alaska issues for the Wilderness Society.

Q. The Wilderness Society?

A. Uh-huh.

Q. Could you –

A. What I did?

Q. – describe what the Wilderness Society is? Is that –

A. Oh, the Wilderness Society is a nonprofit environmental organization with offices throughout the United States.

Q. And what were your duties there?

A. I was first an intern and then an assistant to the Alaska Program Director. The final thing that I did was I wrote a booklet called the "Watt-Clark Record on Alaska.". . .

Q. And what were the dates – I'm sorry. What were the dates of employment there, just roughly?

A. I worked there for a year and a half. Let's see. It ended June of '84. Beginning—about February, March of 1983 until June of 1984, something like that.

Tr. at 9-13.

Questioned by Mr. Pollack:

Q. Okay. For 1988, how many trips have you made abroad?

A. One.

Q. One? And to which country was that?

A. To Denmark and Norway.

Q. And in 1987?

A. One to France, Norway. . . .

Q. In your affidavit, you only listed Sri Lanka as a country to which you traveled. Did you travel—

A. In the affidavit that is all that is mentioned. I went to other countries, though.

Q. Okay. Prior to 1986, which countries in addition to Sri Lanka did you travel to?

A. Nepal, India, Italy, France, England, Norway, Germany, Holland, Luxembourg, Belgium, Russia, Canada, Mexico, Puerto Rico—This gets to be a lot of them—Puerto Rico, several different Caribbean Islands. Do you want—

Q. Well, for the record, which Caribbean Islands?

A. I'm trying to think of the name. It begins with an M. Grand Cayman—I have forgotten the name of the other one. I have forgotten the name of it. It wouldn't pertain to this lawsuit, to my knowledge.

Okay. Fine. Going back over these, can you tell me when, generally, what year, you made these trips?

A. Sure.

Q. To Nepal?

A. Nepal would be 1981-82.

Q. India?

A. 1981-82.

Q. Italy?

A. 1983 and 1976. . . .

Q. And France?

A. France, 1959 to 1960. I was born there. Two trips as a child; 1987, 1976. . . .

Q. England?

A. England, 1976. That would be – might have been 1975, as well.

Q. All right. Norway?

A. Norway? One trip – two trips as a child – below the age of 14, let's say. Then 1975 to '76, and then – okay. You have the other one down.

Q. Okay. Germany?

A. Germany? 1975, 1976, and then you have the other one.

Q. Holland?

A. 1976.

Q. Luxembourg?

A. 1975. I think that's all.

Q. Belgium?

A. 1976.

Q. Russia – you mean the Soviet Union?

A. Soviet Union. 1976.

Q. Mexico?

A. Mexico might have been – let me think a second. That was probably 1986, actually, so it would be up above.

Q. All right. Your Caribbean trip in which you visited Grand Cayman?

A. Yes. It was a cruise. Yes. Grand Cayman was the same time.

Q. And that was 1986?

A. Yes, '86.

Q. And Canada?

A. Canada? 1972 or '73, and time as a child before that, maybe 1971.

Q. Okay. Out of all those trips, which of them involved observing or attempting to observe wildlife as a purpose of the trip?

A. As the sole purpose?

Q. Well, as a significant purpose. . . .

A. If you mean on which of those trips did I view wildlife – can we take it that way? The trip to India, Nepal, Sri Lanka –

Q. Would you like me to repeat the trips one by one for you?

A. No. I would think most of the trips before that – viewing wildlife was something that I did on all those trips, and the trips since the, viewing wildlife – I mean, the trip to Denmark and Norway was our honeymoon, so I couldn't say the significant purpose was to view wildlife, but viewing wildlife was something that I did.

Q. Okay. But for those trips in which wildlife viewing constituted a significant or important purpose, major purpose of the trip, you would say that Nepal, India and Sri Lanka –

A. Definitely; definitely. On the other trips, wildlife viewing did occur.

Q. All right. Well, let's go back over some of the countries individually, and I want to start with Sri Lanka.

A. Okay.

Q. Once again, you visited Sri Lanka over what period of time?

A. 1981 and 1982, and that would have been December to January or February, I believe.

Q. All right. And were you there continuously during that period?

A. Yes.

Q. What activities did you engage in while you were there?—

A. Wildlife viewing, tourism, recreational activities, backpacking.

Q. Okay. Was that wildlife viewing that you did there part of an organized activity? Was it independent?

A. Independent.

Q. Was your hiking trip there independent?

A. Yes, I was traveling there by myself.

Q. Okay. So backpacking, bird watching? Did you say bird watching?

A. Bird watching. I didn't, but bird watching, definitely.

Q. Where did you engage in those activities? For example in Sir Lanka, backpacking?

A. Throughout Sri Lanka. The Mahaweli River Valley; another national park in southeastern Sri Lanka; Newar Eilya in central Sri Lanka. . . . In and around Kandy. . . . On the coast—if we can use backpacking and boating—

Q. Yes.

A. —on the coast, from Trinco Malee . . . and from Newar Eilya out to Adams Peak, which is a wildlife area.

Q. Would those places constitute all the areas you went backpacking, bird watching, boating, wildlife viewing in Sri Lanka, or are there additional—

A. No. Probably Hikadoa. . . . I started in Columbo, backpacked down to Hikadoa—

Q. That's—

A. Backpacked and bussed.

Q. That's on the east coast of Sri Lanka, south of Columbo.

A. Down to Galle. . . . To Matera. . . . To Tangalla. . . . To Tissamaharana. . . . Up to Newara Eilya, . . .

Adams Peak, Ratnapura. . . . Badulla. . . . Up to Kandy. . . . Mahaweli River Valley. . . . Up to Sigriya. . . . Polonnaruwa. . . . And there is Polonnaruwa Wildlife – I think it is a designated wildlife sanctuary up in there where I went. . . . Polonnaruwa Wildlife Sanctuary. . . . Anuradhapura. Trinco Malee. Then I came back by a road that cuts from the east – or by train and by road – from the east coast beginning at Trinco Malee across to Puttalam, and down through Negombo, back to Columbo, and there is a wildlife refuge out in this area . . . the southeast corner, right in here, of Sri Lanka, and it begins with a W, but I have forgotten the name of it . . . to an area [on] generally bounded by – . . .

Q. Tissamaharana, Panama – . . .

A. Yes. . . . Haputale. . . .

Q. Amy, with respect to page five of your affidavit – excuse me, paragraph five of your affidavit – you said that, quote, "a purpose of my visit," unquote, was to observe wildlife. What were the other purposes of your visit to Sri Lanka?

A. Other purposes included meeting and interacting with Sri Lankans and getting to know their culture and viewing the extraordinary natural features and cultural features, natural features including the jungles and the unspoiled areas of Sri Lanka.

Q. During that trip, what – roughly, what percentage of your time did you spend observing or trying to observe wildlife? . . .

A. A rough answer? Observing wildlife was almost a daily occurrence there, from wild birds to sea turtles to other natural animals. But in trips to wildlife areas, specifically, it might have been about a third, as a rough – a third of my time spent viewing wildlife. . . .

Q. . . . Anyway, with respect to paragraph [five??*] of your affidavit –

A. Okay.

Q. —in which you discuss the Mahaweli Project, did you visit the Mahaweli Project, the actual site?

A. Yes, definitely visited the Mahaweli River and river valley, which is all east and northeast of Kandy. As for whether something was being developed right there, and whether or not I was standing on something that was the site—nothing was marked. I mean, there is no—there were no markings that said, "This is the home of the future Mahaweli Project," but I was in the Mahaweli River Valley and viewing wildlife in that area.

Q. And when during your trip was that?

A. It was a trip that I took out of Kandy, when I was in Kandy. Day what, I don't know.

Q. First part of your trip, end of your trip?

A. Oh, probably middle of the trip.

Q. How long did you spend in the Mahweli River Valley?

A. In that area, in the Kandy area, I spent, to the best of my knowledge, maybe four or five days.

Q. How did you know you were at the Mahaweli Project area?

A. That that area was the project I figured out later from reading the environmental assessment. It was the Mahaweli River. It was the Mahaweli River Valley, and that's—

Q. What stage of the project, then, would you guess that you were visiting?

A. Early.

Q. Was there any sign of development at all?

A. There could have been. There could have been. I wasn't particularly looking for something, but there could have been. . . .

Q. Do you know what endangered species are known to exist in the project area, in the Mahaweli River Valley?

A. Some of them. There is the Indian elephant, leopard, python, a crocodile. I don't know the species or the genus, but – a macaw – no, wait. A type of monkey, and several other animals. I'm not sure of the – I'm trying to think.

Q. What is your source of – the source of your knowledge for your belief that those animals inhabit the Mahaweli River Project area?

A. For the elephant and the leopard, it was communicated to me verbally when I was in Sri Lanka, that those animals existed in the Mahaweli River Valley area. There was also something written up about them in the document prepared for AID. The other animals were in the – were listed in the U.S. Court of Appeals 8th Circuit decision, and some of those I may have known were there at the time, but I'm not sure.

Q. Thanks. Do you have any knowledge of the impact of the project on the elephant and leopard that you mentioned and the other endangered species? . . . Well, what the effects of the project might be on those species? . . .

A. Yes. The effect would be largely on habitat. This is critical or important habitat for those species, especially the large species like the elephant and lion, which need a fair amount of undisturbed habitat. So the effect, the end effect may be that it diminishes the number of endangered species.

Q. And on what do you base your conclusion – those conclusions?

A. Professional experience, the effect of loss of habitat on species that need a particular type of habitat, especially large mammals. . . .

Q. Have you read studies that –

A. Yes. . . .

Tr. at 29-44.

Questioned by Mr. Pollack:

Q. Do you have any current plans, present plans to visit the Mahaweli Project in the future?

A. I intend to go back to Sri Lanka.

Q. And when?

A. I don't know. There is a civil war going on right now. I don't know. Not next year, I will say. In the future.

Q. And for what purpose would you like to go back to Sri Lanka to visit the Mahaweli Project?

A. I'd rather go back to visit the wildlife that live in the area of the Mahaweli Project, and to view wildlife in that area and other areas of Sri Lanka.

Q. . . . Once again, for Nepal, when did you go—excuse me. . . .

A. 1981.

Q. Thanks. How long did you spend there?

A. About five months.

Q. What kind of activities did you engage in in Nepal?

A. Backpacking, trekking, river rafting, wildlife viewing, tourism, cultural—I don't know what to call it—cultural experiences, and I think that's most—

Q. Does trekking mean something different than—

A. I'm sorry. Trekking or hiking or backpacking would be the same.

Q. Were you in an organized group or traveling by yourself?

A. I was not in an organized group. I began traveling with three other Americans, but spent about four and a half months traveling by myself.

Q. And then you started traveling with some people you met there?

A. No, I began traveling with some Americans, and then I traveled by myself.

Q. Okay. Where, specifically, did you engage in those activities? . . .

A. Okay. Began in Kathmandu. . . . Kathmandu up to Dumare— . . . and began a trek around the Annapurna Range.

Q. . . . Generally, how long did that trip to the Annapurna Range take?

A. The trek around the Annapurna he Range, ending in Pokhara . . . was about a month and a half.

Q. And that was early—the first part of your trip?

A. The first part of the trip. We took a trip down to Chitwan . . . National Park. It is on the border with India.

Q. And how long did you spend in Chitwan?

A. Spent a week, roughly a week in Chitwan. . . . Okay. And then went on a river trip down the Trisuli . . . River and visited Patan . . . Botan—I'm sorry. I don't now what the other place was called.

Q. May the record reflect that she is showing an area on the map from Pokhara . . . to Patan.

A. And south to the Indian border.

Q. And south to the Indian border. Does that about cover the areas that you visited?

A. Uh-huh, yes.

Q. —are you aware of any development project in Nepal which is being funded or carried out directly by a federal agency?

A. I'm aware that there are projects in Nepal that are being carried out and funded by U.S. agencies, and particularly reforestation projects.

Q. Could you—

A. I think AID is involved in them, and World Bank is involved in them. . . .

Q. . . . when you were traveling in Nepal, did you visit any U.S. funded development project in—

A. I may have, but not as a purpose of a visit. —there were reforestation projects going on throughout the areas that I visited. . . . It would have been—it would have been

sort of throughout the trips that were outside of Kathmandu, so that trip around the Annapurna Range, a trip down the Trisuli; I believe in the area around Chitwan, but I only have a general knowledge that there were those projects going on, and that I may have seen reforestation projects, but not the specifics of them.

Tr. at 46-52.

Q. Amy, to rephrase the last question before the break, in addition to the site where you saw the planted trees near Annapurna, what other sites did you visit in Nepal which you believed to be directly funded U.S. projects, U.S. development projects?

A. There were several different reforestation projects. . . . There is a dam in Pokhara that I believe was funded in part with U.S. funds.

Tr. at 57.

Questioned by Mr. Pollack:

A. Wait – in Nepal?

Q. Yes. We are talking about the two, the dam and the tree planting project. . . . What endangered species are known to exist in those areas?

A. I believe the snow leopard may exist in the area around – may or may have existed. . . .

Q. And you understand that snow leopards occur in areas near or around both of these projects?

A. I believe around the – in the Annapurna Range.

Tr. at 63.

Questioned by Mr. Pollard:

Q. All right. Do you have any present plans to visit any federally funded projects abroad other than the Mahaweli Project?

A. A better answer might be I intend to visit areas where U.S. projects may be taking place sometime in the future; foreign countries.

Q. Which projects?

A. The Mahaweli area, very likely Nepal again. I don't know specific project names, and the purpose of the visit—I mean, all I can say is that I intend to visit areas where there will be or where there probably are U.S. projects taking place just because I'd like to go back to that area, to other developing countries.

Tr. at 65-66.

Questioned by Mr. Anderson:

Q. Okay. Just to make sure that things are clear, you visited the Mahaweli Project site in Sri Lanka to observe wildlife?

A. Yes, I did.

Q. And that was in 1981-82?

A. Yes.

Q. And you confirmed later on that you were at the Mahaweli Project site by looking at the AID Environmental Assessment?

A. Yes.

Q. Were there any other federally funded projects in Sri Lanka that you may have visited?

A. I may have visited some projects, Bureau of Reclamation projects, north of Kandy.

Q. Do you know what kind of projects those were?

A. Dam projects.

Tr. at 68.

Q. Are there any federally funded foreign projects that you've studied?

A. Yes, the Polonoreste project in Brazil.

Q. What kind of a project is that?

A. It is a transmigration project and a road building project.

Q. And in what connection did you study that project?

A. Studied it in connection with my graduate studies

at Johns Hopkins, specifically to look at the effects of that project on wildlife and the environment in that area.

Q. And what did you determine would be the effects of the project on the wildlife in the area?

A. The Polonoreste project has taken place, and the effect on wildlife has been—and habitat has been large clearings of Amazon forest and settlement, which has resulted in the loss of species, many species of which were never identified.

Tr. at 69-70.

Q. With regard to all of these projects that you have either visited or have studied, how would you be harmed by the failure for there to be any consultation under the Endangered Species Act?

A. I'd be harmed both professionally and personally or emotionally. Professionally with the projects in Southeast Asia because those are areas of professional interest to me.

Q. From your degree in South and Southeast Asian studies?

A. Right. And personally or emotionally harmed because wildlife—endangered species in those areas of those projects may or would be adversely affected, resulting in the loss of more of those species or more of those animals or the whole species, and the basic knowledge that those species exist are important to me.

Q. So would it be fair to say that your interest in seeing that there is a Section 7 consultation for these projects is different than from sort of an average, ordinary person on the street?

A. Yes.

Q. And that relates to your professional and avocational interest in studying endangered species?

A. Yes, and in viewing them, as well.

Tr. at 71-72.

Testimony Regarding The Efficacy Of The Section 7 Consultation Process

Q. Are you at all generally familiar with the Section 7 consultation section of that Act?

A. Familiar, generally, yes.

Q. Do you have any particular understanding of its purposes and goals?

A. It requires, I believe, consultation between—consultation regarding any development projects using U.S. federal funds, be they national or international projects.

Q. Under your understanding, what events would trigger a requirement for consultation?

A. My understanding would be any project that had a possible effect on wildlife, either a domestic project or an international project, as long as U.S. government funds were used in that project.

Q. Would a rule-making proceeding require consultation in your understanding? . . . Do you understand what I mean when I say a "rule-making" proceeding?

A. I sort of come up with a couple definitions, so if you could—what do you mean?

Q. A policy by an executive agency, which is translated to a requirement of general applicability—

A. Yes. I would think it would require it—if you are talking about a policy or rule which would have an effect on future projects and the Endangered Species Act, yes.

Q. All right. . . . In your understanding, would a transfer of funds from the Secretary of the Treasury to another agency require consultation at that point? These are funds designated for a particular project.

A. Yes. Yes. Then yes.

Q. Would transfer of funds from the Secretary of the Treasury to the World Bank for use in a project also trigger—

A. Yes.

Q. —a consultation requirement?

A. Yes. . . .

Q. Could you briefly describe your understanding of the consultation process, who the parties might be in the consultation?

A. Consultation would take place between agencies, between—you mean—you'd have to elaborate a little bit further.

Q. Well, who might be required—who might engage in a consultation, once one takes place? . . . If the purpose of the Endangered Species Act is to assess the effect on endangered species and habitat of particular governmental actions undertaken by agencies—if that is a fair characterization of your understanding of the Act—

A. It doesn't have to be just governments. It doesn't have to be the U.S. government, actually. . . .

Q. If there is an action, can the Secretary of Interior require another federal agency to consult with the Secretary of the Interior on that action?

A. I believe he can.

Q. Do you know under what authority the Secretary of the Interior would be able to require a consultation by the other federal agency?

A. The authority of the Endangered Species Act.

Tr. at 15-20.

Q. Just to clarify and clear up any problems in the record, do you know if the Secretary of Interior can prevent a project from going forward after consultation has occurred?

A. Yes, he can. An example would be the case of the snail darter, where, after consultation has occurred, if there is a finding that there is no way to mitigate the problem or the impacts of the project, then the Secretary can prevent the project from going forward for domestic pro-

jects. On international projects, you are dealing with a foreign sovereign country, and he cannot prevent – to the best of my knowledge, he could not prevent a project from occurring in another country.

Tr. at 22-23.

Q. Do you believe that there is a connection between the Secretary's challenged regulation in this case and the Mahaweli Project?

A. Yes, I Do.

Q. And can you describe that connection?

A. The Mahaweli Project is a project that will cause the loss of habitat used by endangered species. Section 7 requires a consultation with the Fish and Wildlife Service on – where endangered species are involved in order to develop measures to mitigate the consequences on endangered species. And I believe that if such a consultation took place, mitigating measures could be implemented to prevent or to mitigate the harm to endangered species.

Q. Do you believe that –

A. – or prevent harm to any endangered species.

Tr. at 45.

Q. Do you believe that there is a connection between the Secretary's challenged consultation regulation and the projects which you have visited, specifically those two projects in Nepal?

A. Yes. To the extent that when a federally funded development project occurs in a foreign country, the Endangered Species Act requires a consultation to develop mitigating measures or to prevent harm to endangered species in that area.

Tr. at 62.

Questioned by Mr. Anderson:

Q. Okay. You mentioned that in response to one of Mr. Pollard's questions, that you didn't believe that the United States could stop a foreign project or stop a

foreign government from completing a project through a Section 7 consultation. Do you have any understanding or belief as to what benefit there would be from a consultation and international contacts under Section 7?

A. Yes. I think that foreign governments in developing countries especially are dependent on U.S. aid and aid from other developed countries, and if the United States made it clear that protecting endangered species was a priority of the American government, projects would be altered by host governments in order to protect the species, further protect the species.

Tr. at 70-72

Testimony Regarding Deponent's Familiarity With This Action.

Questioned by Mr. Pollack:

Q. Amy, what is your understanding of this particular lawsuit? Do you have any understanding of the issues involved in this lawsuit?

A. Yes. There was an agency—or there was an action by the—I guess the Department of Interior to explicitly state that agencies involved in foreign—U.S. agencies involved in foreign development projects need not consult with the Fish and Wildlife Service under the Endangered Species Act, and this lawsuit is a suit to show that, under the ESA, the, in fact—other agencies, do, in fact, need to consult with the Fish and Wildlife Service.

Q. And in your understanding, when in fact—

A. A project—

Q. —an international project that occurs within the territorial boundaries of another sovereign?

A. Yes.

Q. You said that the action challenges the Secretary of the Interior's decision, I guess, to exempt those foreign

projects from the consultation procedure. Do you know that that was a regulation that was promulgated by the Secretary of Interior that forms the challenge—

A. The basis of this—

Q. —the basis of this lawsuit?

A. Yes.

Q. When and how did you hear about the regulation which is challenged in this lawsuit?

A. I don't know an exact date, but it was while I was working at Defenders of Wildlife.

Q. Just generally—

A. How? John Fitzgerald, the endangered species specialist.

Q. You heard from Mr. Fitzgerald, who was also working for Defenders of Wildlife at that time?

A. Right.

Q. And do you know when this—

A. He first brought it up.

Q. Pardon me?

A. He first brought it up. I think that might have been when I first heard it. I don't know.

Q. Do you know when the regulation was published?

A. No, I don't. . . .

Q. Amy, did you participate in any of the rule-making procedures that eventually gave rise to this regulation?

A. If Defenders of Wildlife participated, then I was participating with them.

Q. Did you personally participate in any way?

A. As a member of Defenders of Wildlife. . . .

Q. When and how did you communicate to the Defenders that you believed you would be personally injured by the Secretary's regulation?

A. When it was brought to my attention that one of the possible problems was the Mahaweli Dam in Sri

Lanka, and I knew that I'd been to [that?] area.

Q. And who brought that to your attention?

A. John Fitzgerald, in a general way, I think, mentioned it as one of the – might have been a staff meeting or something, but the Mahaweli Dam was one of the areas that could be affected or that would be affected.

Q. Do you have any idea when that came to your attention?

A. It would be 1986.

Tr. at 23-26.

AFFIDAVIT III OF RICHARD A. DUNCAN

State of Minnesota)
) ss.
County of Hennepin)

Richard Duncan being duly sworn, states based on his knowledge, information and belief:

1. I am an attorney licensed to practice in the State of Minnesota, and currently practice with the firm of Faegre & Benson, Minneapolis, Minnesota.

2. I assembled the attachment to this affidavit, excerpts from the U.S. Agency for International Development's Congressional Presentation for Fiscal Year 1989 ("AID FY89 Report" or "the Report").

3. The AID FY89 Report consists of seven volumes and four annexes, totalling approximately 2500 pages. Counsel for plaintiffs received the AID FY89 Report on the afternoon of January 4, 1989. Due to the Report's great length, only selected excerpts have been attached.

4. The attached excerpts from the AID FY89 Report list AID projects worldwide and present specific summaries of federal agency development actions for seven countries: Botswana, Kenya, Indonesia, Sri Lanka, Thailand, Costa Rica, and Peru. Persons who have submitted affidavits on behalf of the plaintiffs in this lawsuit have testified that they have visited, are currently visiting, and/or have plans to visit these countries on personal and professional business for the purpose of studying endangered and threatened species of wildlife and their habitat (see Plaintiffs' App. Ex. Nos. 30-37); wildlife and habitat that the AID FY89 Report indicates may be affected by federal agency action.

5. Pages 1 through 7 of the attachment are true and correct copies of portions of the "Summary Tables" volume of the AID FY89 Report, specifically Table 5A,

referred to in the Report as the "All Spigots Table." This table lists "FY1987 U.S. Economic and Military Assistance – Actual Obligations" on, *inter alia,* a country-by-country basis.

6. Pages 8 through 33 of the attachment are true and correct copies of portions of Annex I to the AID FY89 Report, "Africa." The excerpts provide a "Summary of Programs by Country and Appropriation" for each African country receiving U.S. AID assistance for the years 1986-1989, and detailed individual country summaries of U.S. AID projects for Botswana and Kenya.

7. Pages 34 through 87 of the attachment are true and correct copies of portions of Annex II to the AID FY89 Report, "Asia and Near East." The excerpts provide a "Summary of Programs by Country and Appropriation" for each Asian and Near Eastern country (plus Poland) receiving U.S. AID assistance for the years 1986-1989, and detailed individual country summaries of U.S. AID projects for Indonesia, Sri Lanka, and Thailand.

8. Pages 88 through 125 of the attachment are true and correct copies of portions of Annex III to the AID FY89 Report, "Latin America and the Caribbean." The excerpts provide a summary of programs by country and appropriation for each Latin American and Caribbean country receiving U.S. AID assistance for the years 1986-1989, and detailed individual country summaries of U.S. AID projects for Costa Rica and Peru.

Dated: January 6, 1989 /s/ Richard A. Duncan
RICHARD A. DUNCAN

Subscribed and sworn to before
me this 6th day of January, 1989.

/s/ Lori J. Timm
Notary Public

58910 [SEAL]

Supreme Court of the United States

No. 90-1424

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

ORDER ALLOWING CERTIORARI Filed May 13, 1991.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

May 13, 1991